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No. 74-1488

In the Supreme Court of the United States

OCTOBER TERM, 1974

ROGERS C. B. MORTON,
SECRETARY OF THE INTERIOR, APPELLANT

v.

STATE OF NEW MEXICO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

JURISDICTIONAL STATEMENT

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Constitutional provision and statutes involved	2
Question presented	2
Statement	3
The question is substantial	6
Conclusion	11
Appendix A	1a
Appendix B	7a
Appendix C	9a
Appendix D	10a
Appendix E	12a
Appendix F	14a
Appendix G	21a

CITATIONS

Cases:

Alabama v. *Texas*, 347 U.S. 272	7
Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288	7
Camfield v. *United States*, 167 U.S. 518	7, 8

Cases—Continued

	Page
Federal Power Commission v. *Idaho Power Co.*, 344 U.S. 17	7
Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241	11
Hunt v. *United States*, 278 U.S. 96	8, 9
Ivanhoe Irrigation District v. *McCracken*, 357 U.S. 275	7
Oklahoma v. *Atkinson Co.*, 313 U.S. 508	11
Sinclair v. *United States*, 279 U.S. 263	8
United States v. *California*, 332 U.S. 19	7
United States v. *Midwest Oil Co.*, 236 U.S. 459	8
United States v. *San Francisco*, 310 U.S. 16	7

Constitution, statutes and regulation:

	Page
U.S. Constitution, Art. IV, Sec. 3	2, 6
Endangered Species Act of 1973, 16 U.S.C. (Supp. III) 1531, *et seq.*	9
Fur Seal Act, 16 U.S.C. 1151, *et seq.*	9
Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. (Supp. III) 1361, *et seq.*	9
National Wildlife Refuge System Act, as amended, 16 U.S.C. 668dd-668ee	9
Wild and Scenic Rivers Act, 16 U.S.C. 1271, *et seq.*	9
Wild Free-Roaming Horses and Burros Act, 85 Stat. 649-651, 16 U.S.C. (Supp. III) 1331-1340:	2, 3, 6, 14a-20a
Sec. 1, 16 U.S.C. 1331	3, 6, 8, 14a
Sec. 3(a), 16 U.S.C. 1333(a)	3, 15a-16a
Sec. 3(b), 16 U.S.C. 1333(b)	10a, 16a

Constitution, statutes and regulation—Continued

	Page
Sec. 3(c), 16 U.S.C. 1333(c)	10, 16a-17a
Sec. 3(d), 16 U.S.C. 1333(d)	11, 17a
Sec. 4, 16 U.S.C. 1334	4, 17a
Sec. 8(a), 16 U.S.C. 1338(a)	3, 18a-19a
Sec. 8(a)(4), 16 U.S.C. 1338(a)(4)	11, 19a
16 U.S.C. 26	9
16 U.S.C. 98-99	9
16 U.S.C. 671-697a	9
18 U.S.C. 41	9
28 U.S.C. 2282	5
New Mexico Statutes Annotated:	
New Mexico Estray Law, §§ 47-14-1 *et seq.* (1966 Repl.):	4
§ 47-14-1	2, 21a
§ 47-14-5	2, 21a
§ 47-23-2(A) (1973 Supp.)	2, 21a
43 C.F.R. Part 4710	4

Congressional materials:

	Page
H.R. Conf. Rep. No. 92-681, 92d Cong., 1st Sess. (1971)	8, 10
H.R. Rep. No. 92-480, 92d Cong., 1st Sess. (1971)	10
S. Rep. No. 92-242, 92d Cong., 1st Sess. (1971)	6, 10

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No.

ROGERS C. B. MORTON,
SECRETARY OF THE INTERIOR, APPELLANT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 1a-6a) is not yet reported.

JURISDICTION

The judgment of the three-judge district court was entered on February 28, 1975 (App. B, *infra*, pp. 7a-8a). The notice of appeal was filed on March 28,

1975 (App. C, *infra*, p. 9a). The first amended judgment of the district court was entered on March 31, 1975 (App. D, *infra*, pp. 10a-11a). The supplemental notice of appeal was filed on April 14, 1975 (App. E, *infra*, pp. 12a-13a). The jurisdiction of this Court is invoked under 28 U.S.C. 1252 and 1253.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. Article IV, Section 3, of the United States Constitution (the "Property Clause") provides in part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

2. The Wild Free-Roaming Horses and Burros Act, 85 Stat. 649-651, 16 U.S.C. (Supp. III) 1331-1340, enacted December 15, 1971, is reproduced in Appendix F, *infra*, pp. 14a-20a.

3. The relevant provisions of Sections 47-14-1, 47-14-5, and 47-23-2(A) of the New Mexico Statutes Annotated are set forth in Appendix G, *infra*, p. 21a.

QUESTION PRESENTED

Whether the Wild Free-Roaming Horses and Burros Act, which protects unbranded and unclaimed horses and burros on public lands of the United States from capture, harassment, or death, exceeds the powers conferred upon Congress by the Property and Commerce Clauses of the Constitution.

STATEMENT

1. At issue in this case is the constitutionality of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. (Supp. III) 1331-1340 (App. F, *infra*, pp. 14a-20a). Section 1 of the Act establishes a policy of protecting unbranded and unclaimed horses and burros on public lands of the United States "from capture, branding, harassment, or death," and it provides that "to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands" (16 U.S.C. 1331).

The Act provides that all wild free-roaming horses and burros on the public lands are committed to the jurisdiction of the Secretary of the Interior, who is "directed to protect and manage [the animals] as components of the public lands * * * in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands" (Section 3(a), 16 U.S.C. 1333(a)). The Act makes it a crime to remove a protected horse or burro from the public lands or convert such an animal to private use without the Secretary's permission, to maliciously kill or harass such an animal, or to process its remains into commercial products (Section 8(a), 16 U.S.C. 1338(a)). If horses or burros "stray from

public lands onto privately owned land, the owners of such land may inform the nearest Federal marshall or agent of the Secretary, who shall arrange to have the animals removed" (Section 4, 16 U.S.C. 1334).[1]

2. In January 1974, a New Mexico rancher complained to the Bureau of Land Management of the United States Department of the Interior, and later to the New Mexico Livestock Board, that several burros were wandering on his private land and on public lands where he grazed his cattle pursuant to a federal permit. He claimed that the burros were molesting his cattle and eating their feed.

On about February 11, 1974, agents of the New Mexico Livestock Board, purportedly acting pursuant to the New Mexico Estray Law (N. Mex. Stat. Ann. §§ 47-14-1, *et seq.*), rounded up and removed 19 unbranded and unclaimed burros from the public lands of the United States (Tr. 16; Pl. Ex. 5). The Board thereafter sold the 19 burros to private purchasers at auction. After learning of the round-up and sale, the Bureau of Land Management, asserting jurisdiction over the burros under the Wild Free-Roaming Horses and Burros Act, demanded that the animals be returned to the public domain.

In March 1974, respondents (the State of New Mexico, the New Mexico Livestock Board, the Board's director, and a purchaser of the burros) brought this

[1] The Secretary's regulations implementing the statute appear at 43 C.F.R. Part 4710.

action in the United States District Court for the District of New Mexico. The complaint sought a declaration that the Wild Free-Roaming Horses and Burros Act is unconstitutional and an injunction against the Act's enforcement. A three-judge court was convened pursuant to 28 U.S.C. 2282.

On cross-motions for summary judgment, the district court ruled that the Act is unconstitutional and permanently enjoined the Secretary of the Interior from enforcing its provisions (App. A, *infra*, pp. 1a-6a).[2] The court held that Congress is without constitutional authority to regulate animals found on federal lands unless such regulation is necessary for the "*protection* of the public lands from damage of some kind" (*id.* at 5a; emphasis in original). Here, however, "[t]he statute is aimed at protecting the wild horses and burros, not at protecting the land they live on," and "[t]here is no Congressional finding nor any evidence to indicate that wild horses and burros are damaging the public lands" (*ibid.*). The court also held that the Act cannot be sustained as an exercise of congressional authority under the Commerce Clause, because "all the evidence establishes that the wild burros in question here do not migrate across state lines" and "Congress made no findings to indicate that it was in any way relying on the Commerce Clause in enacting this statute" (*id.* at 5a-6a).

[2] On March 7, 1975, the district court stayed its injunction pending further order of the court.

THE QUESTION IS SUBSTANTIAL

Although an estimated two million wild horses once roamed the plains and mountains in the West, in this century their numbers have drastically dwindled. As Congress found in 1971, these animals "have been cruelly captured and slain and their carcasses used in the production of pet food and fertilizer. They have been used for target practice and harassed for 'sport' and profit. In spite of public outrage, this bloody traffic continues unabated, and * * * this senseless slaughter must be brought to end."[3] In order to prevent wild horses and burros from becoming extinct, Congress enacted the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. (Supp. III) 1331-1340, which protects these animals on the public lands of the United States by prohibiting their removal, harassment, or slaughter. Although Congress expressly found in Section 1 of the Act (16 U.S.C. 1331) that wild horses and burros are "an integral part of the natural system of the public lands," the district court held that the Act exceeded congressional authority under the Constitution and that Congress had no power to protect these animals. The decision is plainly wrong and should be reversed.

1. The power of Congress to regulate and protect wild animals on the public lands is implicit in its plenary jurisdiction over federal territory. Article IV, Section 3, of the Constitution provides that "Congress shall have Power to dispose of and make all

[3] S. Rep. No. 92-242, 92d Cong., 1st Sess. 1-2 (1971).

needful Rules and Regulations respecting the Territory and other Property belonging to the United States." This Court has repeatedly stated that "[t]he power over the public land thus entrusted to Congress is without limitations." *United States* v. *San Francisco*, 310 U.S. 16, 29; *United States* v. *California*, 332 U.S. 19, 27; *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 21; *Alabama* v. *Texas*, 347 U.S. 272, 273; *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 294-295.

That plenary power extends not only to the land itself but also to "what the land contain[s]" (*Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 333). It follows that Congress may provide for the management and control of the mineral, water, energy, aesthetic, and other natural resources of the public domain. In *Ashwander*, for example, the Court held that the water power created by a government dam, the right to convert the power into electric energy, and the electric energy thus produced constituted property of the United States, the disposition of which was within the exclusive control of Congress under the Property Clause (297 U.S. at 330-340).

With respect to federal territory, moreover, Congress has full legislative jurisdiction, "analogous to the police power of the several States" (*Camfield* v. *United States*, 167 U.S. 518, 525), and may therefore broadly govern in the interest of the public health, welfare, and morals. In addition, "the Government has, with respect to its own lands, the rights

of an ordinary proprietor, to maintain its possession and to prosecute trespassers" (*id.* at 524). See also *Sinclair* v. *United States*, 279 U.S. 263, 297; *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 474.

Congress specifically determined in the Wild Free-Roaming Horses and Burros Act that wild horses and burros are "an integral part of the natural system of the public lands" (Section 1, 16 U.S.C. 1331). Protection and management of the animals was deemed necessary "for achievement of an ecological balance on the public lands" (H.R. Conf. Rep. No 92-681, 92d Cong., 1st Sess. 5 (1971)). Especially in light of those findings, it is plain that Congress acted within the scope of its broad authority under the Property Clause by providing for the protection of wild horses and burros on the public lands from continued depredation by man.

This Court held in *Hunt* v. *United States*, 278 U.S. 96, that the government's authority over the public lands includes the power to manage and control the deer population in national forests and game preserves. In that case, as a result of overpopulation, the deer had "greatly injured the lands in the reserves by over-browsing upon and killing valuable young trees, shrubs, bushes and forage plants" (278 U.S. at 99). The Secretary of Agriculture, acting pursuant to statutory authority, caused large numbers of deer to be killed and their carcasses to be shipped outside the limits of the reserves. The Court held that "the power of the United States to thus protect its lands and property does not admit of

doubt, * * * the game laws or any other statute of the state to the contrary notwithstanding" (*id.* at 100).

The district court in the present case inferred from *Hunt* that the power of Congress is limited to protecting federal lands from physical damage and does not extend to protecting wild animals found on the lands. But *Hunt* held only that damage to the land was a *sufficient* basis for invoking the Property Clause; it did not hold or imply that damage is *necessary* as a basis for federal regulation. Just as Congress may provide for the protection of valuable water or mineral resources on federal lands, so too it may provide for the protection of wildlife on federal lands,[4] irrespective of any threat of damage to the land itself.[5]

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[4] Under the district court's rationale, many of the federal wildlife programs would be unconstitutional. See, *e.g.*, the National Wildlife Refuge System Act of 1966, as amended, 16 U.S.C. 668dd-668ee; 16 U.S.C. 671-697a (establishing specific federal wildlife sanctuaries); 16 U.S.C. 26, 98-99 (providing for wildlife protection in national parks); Fur Seal Act of 1966, 16 U.S.C. 1151, *et seq.*; Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. (Supp. III) 1361, *et seq.*; Endangered Species Act of 1973, 16 U.S.C. (Supp. III) 1531, *et seq.*; Wild and Scenic Rivers Act, 16 U.S.C. 1271, *et seq.*; 18 U.S.C. 41 (penalizing the seizure or disturbance of wildlife on lands set apart for sanctuaries, refuges, or breeding grounds).

[5] In any event, Congress found, contrary to the district court's assertion (App. A, *infra*, p. 5a), that federal regulation of wild horses and burros was necessary in part to protect the public lands from damage. The Department of Agri-

2. The Act is also within the scope of Congress's legislative authority to regulate interstate commerce. The legislative history shows that Congress was concerned with the commercial exploitation of wild horses and burros and that the Act was designed in part to prevent such exploitation. The Senate Committee found that wild horses and burros "have been cruelly captured and slain and their carcasses used in the production of pet food and fertilizer"; it was "the expressed intent of the committee to remove the possibility of monetary gain from exploitation of these animals" (S. Rep. No. 92-242, *supra*, pp. 1-2, 4). The House Committee likewise sought to end the "commercialization" of these animals by eliminating "the processing of wild horses and burros into pet food" (H.R. Rep. No. 92-480, *supra*, p. 4).

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culture informed the House and Senate Committees that "[w]hen horses and burros become too numerous they are particularly destructive of their range" and that "[a]ny management system would need some realistic provisions for herd reduction" (S. Rep. No. 92-242, 92d Cong., 1st Sess. 12 (1971); H.R. Rep. No. 92-480, 92d Cong., 1st Sess. 12 (1971)). Although the principal objective of the legislation was to "insure the preservation and protection of the few remaining wild free-roaming horses and burros" (H.R. Conf. Rep No. 92-681, 92d Cong., 1st Sess. 7 (1971)), both Committees recognized that "some control over the numbers of animals may be necessary in order to maintain an ecological balance in an area" (S. Rep. No. 92-242, *supra*, p. 4; H.R. Rep. No. 92-480, *supra*, p. 5). The Act accordingly gives the Secretary of the Interior the authority to reduce the number of horses and burros in an overpopulated area (Section 3(b) and (c), 16 U.S.C. 1333(b) and (c)).

The Act accordingly makes it a crime to process the remains of a wild horse or burro into "commercial products" (Section 8(a)(4), 16 U.S.C. 1338(a)(4)); it permits the "customary disposal" of the remains of a deceased animal but provides that "in no event shall such remains * * * be sold for any consideration, directly or indirectly" (Section 3(d), 16 U.S.C. 1333(d)).

The effect upon interstate commerce of the commercial exploitation of wild horses and burros "empowered Congress to enact appropriate legislation," and that legislation is no less valid because it serves other purposes as well. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 257; *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 528.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WALLACE H. JOHNSON,
Assistant Attorney General.

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MAY 1975.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 74-127

[Filed at Albuquerque Feb. 28, 1975,
L. G. Kanaly, Clerk]

STATE OF NEW MEXICO, NEW MEXICO STATE LIVESTOCK BOARD, LEE S. GARNER, and CLAUDE FOSTER, PLAINTIFFS

v.

ROGERS C. B. MORTON, Secretary, United States Department of the Interior, VICTOR R. ORTEGA, United States Attorney for the District of New Mexico, and UNITED STATES OF AMERICA, DEFENDANTS

MEMORANDUM OPINION

This action came before the three-judge district court seeking an injunction against the enforcement of the Wild Free-roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340, as being unconstitutional. Jurisdiction of this court is established under sections 1331, 2282, and 2284 of Title 28, U.S.C.

The controversy involved here began when a New Mexico rancher, Kelley Stephenson, discovered several unbranded and unclaimed burros wandering on his private land, and also on public land on which he grazed his cattle pursuant to federal grazing permits. The burros were molesting his cattle, and eat-

ing the feed supplement he had placed out for the cattle. Mr. Stephenson requested the Bureau of Land Management to remove the burros and was refused. He then contacted the New Mexico Livestock Board. The Board rounded up nineteen burros and subsequently sold them at auction pursuant to the provisions of the New Mexico Estray Law, §§ 47-14-1 et seq., N.M.Stat.Ann. (Repl. 1966). An "estray" is defined as:

> "Any bovine animal, horse, mule or ass, found running at large upon public or private lands, either fenced or unfenced, in the state of New Mexico, whose owner is unknown in the section where found, or which shall be fifty (50) miles or more from the limits of its usual range or pasture, or that is branded with a brand which is not on record in the office of the cattle sanitary board of New Mexico . . . ." § 47-14-1, N.M.Stat.Ann. (Repl. 1966).

Subsequent to the auction, the United States asserted the right to possession of the burros under the Wild Free-roaming Horses and Burros Act, and demanded that they be returned to the public domain. This lawsuit ensued.

The federal statute purports to regulate "all unbranded and unclaimed horses and burros on public lands of the United States." 16 U.S.C. § 1332(b). The definition of wild free-roaming horses and burros set out in the regulations promulgated under this section is even broader. Because of our disposition of the case, we do not find it necessary to comment

on these regulations. The authority of Congress to regulate these animals must come from a power specifically granted to it in the Constitution. Afroyim v. Rusk, 387 U.S. 253. The Congressional findings and policy behind the Act are stated in section 1331:

> "Congress finds and declares that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and burros are fast disappearing from the American scene. It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harrassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands."

From these findings, it appears that the Act is grounded in the "Territorial Clause:"

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." U.S.Const. art. IV, § 3.

Congress is here attempting to exercise complete regulation of wild horses and burros whenever found on public land. This conflicts with both the historical interpretation of the Territorial Clause, and the traditional doctrines concerning wild animals.

Wild horses and burros do not become "property" of the United States simply by being physically present on the "territory" or land of the United States. The doctrine of the common law, dating back to the Roman law, has been that wild animals are owned by the state in its sovereign capacity, in trust for the benefit of the people. This sovereign ownership vested in the colonial government and was passed to the states. Gear v. Connecticut, 161 U.S. 519; New Mexico State Game Comm'n v. Udall, 410 F.2d 1197 (10th Cir.), *cert. denied*, 396 U.S. 961. Even though the state ownership doctrine has been described as a legal fiction, Toomer v. Witsell, 334 U.S. 385, it has never been abrogated. Defendants rely on Missouri v. Holland, 252 U.S. 416, to overcome the viability of state ownership. Such reliance is misplaced in that the decision was based on the treaty power of the United States as related to migratory birds. Here the United States must find authority to regulate wild horses and burros in its power to regulate public lands.

The Territorial Clause has been described as establishing "full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them." Utah Power & Light Co. v. United States, 243 U.S. 389, 404. The Government may constitutionally prevent the obstruction of free passage across public lands, McKelvey v. United States, 260 U.S. 353, and protect the public lands from nuisances on adjoining property. Camfield v. United States, 167 U.S. 518.

Three cases have upheld the power of the federal government to kill deer which were damaging federally owned lands through overbrowsing. Hunt v. United States, 278 U.S. 96; New Mexico State Game Comm'n v. Udall, *supra*; Chalk v. United States, 114 F.2d 207 (4th Cir.), *cert. denied*, 312 U.S. 679. *New Mexico State Game Comm'n* even approved the killing of deer as part of a research project to control future population, and thus the possibility of future damage from over-population. The common thread running through the cases decided under the Territorial Clause is that of *protection* of the public lands from damage of some kind. *See also*, United States v. Alford, 274 U.S. 264, concerning the protection of public lands from fire.

There is no Congressional finding nor any evidence to indicate that wild horses and burros are damaging the public lands. The statute is aimed at protecting the wild horses and burros, not at protecting the land they live on. Thus, we find that the Wild Free-roaming Horses and Burros Act cannot be sustained as an exercise of the power granted to Congress in Art. IV, § 3 of the Constitution.

The Government argues in its brief that the Act may be sustained as an exercise of the power granted in the Commerce Clause. No evidence was presented to support this theory; in fact, all the evidence establishes that the wild burros in question here do not migrate across state lines. Further, the Congress made no findings to indicate that it was in any way

relying on the Commerce Clause in enacting this statute. This argument must fail.

Since we find the federal act to be unconstitutional, there is no question of preemption of the New Mexico Estray Law. National Railroad Passenger Corp. v. Miller, 358 F.Supp. 1321 (D.Kan.), *aff'd*, 414 U.S. 948. The defendants are hereby permanently enjoined from enforcing the provisions of the Wild Free-roaming Horses and Burros Act, 16 U.S.C. §§ 1331 et seq.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 74-127 Civil

[Filed at Albuquerque Feb. 28, 1975,
L. G. Kanaly, Clerk]

STATE OF NEW MEXICO, NEW MEXICO STATE LIVESTOCK BOARD, LEE S. GARNER, and CLAUDE FOSTER, PLAINTIFFS

vs.

ROGERS C. B. MORTON, Secretary, United States Department of the Interior, VICTOR R. ORTEGA, United States Attorney for the District of New Mexico, and THE UNITED STATES OF AMERICA, DEFENDANTS

JUDGMENT

THIS MATTER having come before the Court upon the complaint of the plaintiffs seeking declaratory and injunctive relief, the Court having considered the evidence, briefs and arguments of counsel, and the Court having filed a Memorandum Opinion herein concluding that certain declaratory and injunctive relief is appropriate and should be granted, therefore, it is hereby,

ORDERED, ADJUDGED, AND DECREED that the Wild Free-Roaming Horses And Burros Act, Section 1331 through 1340, Title 16, United States Code,

be, and the same hereby is, declared unconstitutional. It is further

ORDERED, ADJUDGED AND DECREED that the defendants herein be, and the same hereby are, permanently enjoined and restrained from enforcing or executing the operation of the aforementioned act. It is further

ORDERED, ADJUDGED AND DECREED that each party to this action bear its own costs.

/s/ Oliver Seth
United States Circuit Judge

/s/ H. Vearle Payne
United States District Judge

/s/ E. L. Mechem
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

No. 74-127 Civil

[Original Filed in My Office Mar. 28, 1975,
L. G. Kanaly, Clerk]

STATE OF NEW MEXICO, NEW MEXICO STATE LIVESTOCK BOARD, LEE S. GARNER, and CLAUDE FOSTER, PLAINTIFFS

vs.

ROGERS C. B. MORTON, Secretary, United States Department of Interior, DEFENDANT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the defendant Rogers C. B. Morton appeals to the Supreme Court of the United States from the judgment entered in this action in favor of plaintiffs, on February 28, 1975. This appeal is taken pursuant to 28 U.S.C. 1252 and 28 U.S.C. 1253.

VICTOR R. ORTEGA
United States Attorney

By: _____
JAMES B. GRANT
Assistant United States Attorney

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 74-127 Civil

[Filed at Albuquerque Mar. 31, 1975,
L. G. Kanaly, Clerk]

STATE OF NEW MEXICO, NEW MEXICO STATE LIVESTOCK BOARD, LEE S. GARNER, and CLAUDE FOSTER, PLAINTIFFS

vs.

ROGERS C. B. MORTON, Secretary, United States Department of Interior, DEFENDANT

FIRST AMENDED JUDGMENT

THIS MATTER having come before the Court upon the complaint of the plaintiffs seeking declaratory and injunctive relief, the Court having considered the evidence, briefs and arguments of counsel and the Court having filed a Memorandum Opinion herein concluding that certain declaratory and injunctive relief is appropriate and should be granted, therefore, it is hereby,

ORDERED, ADJUDGED, AND DECREED that the Wild Free-Roaming Horses And Burros Act, Section 1331 through 1340, Title 16, United States Code, be, and the same hereby is, declared unconstitutional. It is further

ORDERED, ADJUDGED AND DECREED that the defendant herein be, and the same hereby is, permanently enjoined and restrained from enforcing or executing the operation of the aforementioned act. It is further

ORDERED, ADJUDGED AND DECREED that each party to this action bear its own costs.

/s/ Oliver Seth
United States Circuit Judge

/s/ H. Vearle Payne
United States District Judge

/s/ E. L. Mechem
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 74-127 Civil

[Original Filed in My Office Apr. 14, 1975,
L. G. Kanaly, Clerk]

STATE OF NEW MEXICO, NEW MEXICO STATE LIVESTOCK BOARD, LEE S. GARNER, and CLAUDE FOSTER, PLAINTIFFS

vs.

ROGERS C. B. MORTON, Secretary, United States Department of Interior, DEFENDANT

SUPPLEMENTAL NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the defendant Rogers C. B. Morton appeals to the Supreme Court of the United States from the judgment entered in this action in favor of plaintiffs, on February 28, 1975, as modified by the first amended judgment entered March 31, 1975. This appeal is taken pursuant to 28 U.S.C. 1252 and 28 U.S.C. 1253.

VICTOR R. ORTEGA
United States Attorney

Original Signed By: JAMES B. GRANT
JAMES B. GRANT
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This will certify that a true copy of the foregoing pleading was mailed to opposing counsel of record this 14th day of April, 1975.

Original Signed By: JAMES B. GRANT
(Asst.) United States Attorney

APPENDIX F

Public Law 92-195
92nd Congress, S. 1116

December 15, 1971

AN ACT

To require the protection, management, and control of wild free-roaming horses and burros on public lands

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress finds and declares that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and burros are fast disappearing from the American scene. It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands.

SEC. 2. As used in this Act—

(a) "Secretary" means the Secretary of the Interior when used in connection with public lands administered by him through the Bureau of Land Management and the Secretary of Agriculture in connection with public lands administered by him through the Forest Service;

(b) "wild free-roaming horses and burros" means all unbranded and unclaimed horses and burros on public lands of the United States;

(c) "range" means the amount of land necessary to sustain an existing herd or herds of wild free-roaming horses and burros, which does not exceed their known territorial limits, and which is devoted principally but not necessarily exclusively to their welfare in keeping with the multiple-use management concept for the public lands;

(d) "herd" means one or more stallions and his mares; and

(e) "public lands" means any lands administered by the Secretary of the Interior through the Bureau of Land Management or by the Secretary of Agriculture through the Forest Service.

SEC. 3. (a) All wild free-roaming horses and burros are hereby declared to be under the jurisdiction of the Secretary for the purpose of management and protection in accordance with the provisions of this Act. The Secretary is authorized and directed to protect and manage wild free-roaming horses and burros as components of the public lands, and he may designate and maintain specific ranges on public lands as sanctuaries for their protection and preservation, where the Secretary after consultation with the wildlife agency of the State wherein any such range is proposed and with the Advisory Board established in section 7 of this Act deems such action desirable. The Secretary shall manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving natural

ecological balance on the public lands. He shall consider the recommendations of qualified scientists in the field of biology and ecology, some of whom shall be independent of both Federal and State agencies and may include members of the Advisory Board established in section 7 of this Act. All management activities shall be at the minimal feasible level and shall be carried out in consultation with the wildlife agency of the State wherein such lands are located in order to protect the natural ecological balance of all wildlife species which inhabit such lands, particularly endangered wildlife species. Any adjustments in forage allocations on any such lands shall take into consideration the needs of other wildlife species which inhabit such lands.

(b) Where an area is found to be overpopulated, the Secretary, after consulting with the Advisory Board, may order old, sick, or lame animals to be destroyed in the most humane manner possible, and he may cause additional excess wild free-roaming horses and burros to be captured and removed for private maintenance under humane conditions and care.

(c) The Secretary may order wild free-roaming horses or burros to be destroyed in the most humane manner possible when he deems such action to be an act of mercy or when in his judgment such action is necessary to preserve and maintain the habitat in a suitable condition for continued use. No wild free-roaming horse or burro shall be ordered to be destroyed because of overpopulation unless in the judg-

ment of the Secretary such action is the only practical way to remove excess animals from the area.

(d) Nothing in this Act shall preclude the customary disposal of the remains of a deceased wild free-roaming horse or burro, including those in the authorized possession of private parties, but in no event shall such remains, or any part thereof, be sold for any consideration, directly or indirectly.

SEC. 4. If wild free-roaming horses or burros stray from public lands onto privately owned land, the owners of such land may inform the nearest Federal marshall or agent of the Secretary, who shall arrange to have the animals removed. In no event shall such wild free-roaming horses and burros be destroyed except by the agents of the Secretary. Nothing in this section shall be construed to prohibit a private landowner from maintaining wild free-roaming horses or burros on his private lands, or lands leased from the Government, if he does so in a manner that protects them from harassment, and if the animals were not willfully removed or enticed from the public lands. Any individuals who maintain such wild free-roaming horses or burros on their private lands or lands leased from the Government shall notify the appropriate agent of the Secretary and supply him with a reasonable approximation of the number of animals so maintained.

SEC. 5. A person claiming ownership of a horse or burro on the public lands shall be entitled to recover it only if recovery is permissible under the

branding and estray laws of the State in which the animal is found.

SEC. 6. The Secretary is authorized to enter into cooperative agreements with other landowners and with the State and local governmental agencies and may issue such regulations as he deems necessary for the furtherance of the purposes of this Act.

SEC. 7. The Secretary of the Interior and the Secretary of Agriculture are authorized and directed to appoint a joint advisory board of not more than nine members to advise them on any matter relating to wild free-roaming horses and burros and their management and protection. They shall select as advisers persons who are not employees of the Federal or State Governments and whom they deem to have special knowledge about protection of horses and burros, management of wildlife, animal husbandry, or natural resources management. Members of the board shall not receive reimbursement except for travel and other expenditures necessary in connection with their services.

SEC. 8. Any person who—

(1) willfully removes or attempts to remove a wild free-roaming horse or burro from the public lands, without authority from the Secretary, or

(2) converts a wild free-roaming horse or burro to private use, without authority from the Secretary, or

(3) maliciously causes the death or harassment of any wild free-roaming horse or burro, or

(4) processes or permits to be processed into commercial products the remains of a wild free-roaming horse or burro, or

(5) sells, directly or indirectly, a wild free-roaming horse or burro maintained on private or leased land pursuant to section 4 of this Act, or the remains thereof, or

(6) willfully violates a regulation issued pursuant to this Act,

shall be subject to a fine of not more than $2,000, or imprisonment for not more than one year, or both. Any person so charged with such violation by the Secretary may be tried and sentenced by any United States commissioner or magistrate designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions as provided for in section 3401, title 18, United States Code.

(b) Any employee designated by the Secretary of the Interior or the Secretary of Agriculture shall have power, without warrant, to arrest any person committing in the presence of such employee a violation of this Act or any regulation made pursuant thereto, and to take such person immediately for examination or trial before an officer or court of competent jurisdiction, and shall have power to execute any warrant or other process issued by an officer or court of competent jurisdiction to enforce the provisions of this Act or regulations made pursuant thereto. Any judge of a court established under the laws of the United States, or any United States magistrate may, within his respective jurisdiction,

upon proper oath or affirmation showing probable cause, issue warrants in all such cases.

SEC. 9. Nothing in this Act shall be construed to authorize the Secretary to relocate wild free-roaming horses or burros to areas of the public lands where they do not presently exist.

SEC. 10. After the expiration of thirty calendar months following the date of enactment of this Act, and every twenty-four calendar months thereafter, the Secretaries of the Interior and Agriculture will submit to Congress a joint report on the administration of this Act, including a summary of enforcement and/or other actions taken thereunder, costs, and such recommendations for legislative or other actions as he might deem appropriate.

The Secretary of the Interior and the Secretary of Agriculture shall consult with respect to the implementation and enforcement of this Act and to the maximum feasible extent coordinate the activities of their respective departments and in the implementation and enforcement of this Act. The Secretaries are authorized and directed to undertake those studies of the habits of wild free-roaming horses and burros that they may deem necessary in order to carry out the provisions of this Act.

Approved December 15, 1971.

APPENDIX G

Sections 47-14-1, 47-14-5, and 47-23-2(A) of the New Mexico Statutes Annotated provide in part:

> 47-14-1. *Definition of "estray."*—Any bovine animal, horse, mule or ass, found running at large upon public or private lands, either fenced or unfenced, in the state of New Mexico, whose owner is unknown in the section where found, or which shall be fifty [50] miles or more from the limits of its usual range or pasture, or that is branded with a brand which is not on record in the office of the cattle sanitary board of New Mexico, shall be known as an "estray," * * *. [1966 Repl.]
>
> 47-14-5. *Sale of unclaimed estrays—Bill of sale—Effect—Sale without advertisement—Conditions.*—If said estray animal or animals shall not be claimed within twenty [20] days after the last publication of said advertisement they shall be sold by the cattle sanitary board through an authorized brand inspector of said board, in such manner as the board may direct. * * * [1966 Repl.]
>
> 47-23-2. *New Mexico livestock board created —Transfer of powers—Transfer of property.*—A. * * * The New Mexico Livestock Board shall have all powers which have heretofore been held by the cattle sanitary board * * * and those powers are hereby transferred to the New Mexico livestock board. [1973 Supp.]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1488

ROGERS C. B. MORTON, Secretary, Department of Interior, *Appellant*

v.

STATE OF NEW MEXICO, NEW MEXICO STATE LIVESTOCK BOARD, LEE S. GARNER, and CLAUDE FOSTER, *Appellees*

BRIEF OF AMERICAN HORSE PROTECTION ASSOCIATION, AMICUS CURIAE, IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

Page

CONSENT 1

INTEREST OF THE AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. Wild horses and burros are part of America's heritage, and their protection by Federal statute reflects a public policy favoring national conservation of wildlife resources on Federal land 4

II. The common law doctrine concerning ownership of wild animals does not prevent Congress from legislating to protect wildlife found on property owned by the United States 9

III. Congress, in the exercise of its constitutional power to make rules and regulations respecting property belonging to the United States, may also enact legislation protecting wildlife found on Federal lands 16

IV. The Wild, Free-Roaming Horses and Burros Act is a proper exercise of Congressional authority under the Territory and Property Clause 21

CONCLUSION 23

AUTHORITIES CITED

CASES:

Alabama v. *Texas*, 347 U.S. 272 (1954) 12
Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 (1936) 20
Camfield v. *United States*, 167 U.S. 518 (1897) ..17, 20, 22
Chalk v. *United States*, 114 F.2d 207 (4th Cir. 1940) .13, 19
F.P.C. v. *Idaho Power Co.*, 344 U.S. 17 (1952) 18
Geer v. *Connecticut*, 161 U.S. 519 (1896) .9, 10, 11, 12, 14, 15
Hunt v. *United States*, 278 U.S. 96 (1920) 11, 13, 17, 19
Lacoste v. *Department of Conservation*, 263 U.S. 545 (1924) 10, 11, 12

Page

Light v. *United States*, 220 U.S. 523 (1911) 17, 18, 22
Maryland v. *Wirtz*, 392 U.S. 183 (1968) 19
McCready v. *Virginia*, 94 U.S. 391 (1876) 10, 12
McKelvey v. *United States*, 260 U.S. 353 (1922) 22
Missouri v. *Holland*, 252 U.S. 416 (1920) 13, 15
New Mexico v. *Morton*, Civil No. 74-127 (D. N.Mex. Feb. 28, 1975) 3
New Mexico State Game Comm'n v. *Udall*, 410 F.2d 1197 (10th Cir. 1969) 14, 18
Takahashi v. *Fish and Game Comm'n*, 334 U.S. 410 (1948) 12
Toomer v. *Witsell*, 334 U.S. 385 (1948) 11, 12
United States v. *Alford*, 274 U.S. 264 (1927) 22
United States v. *California*, 332 U.S. 19 (1947) 12
United States v. *San Francisco*, 310 U.S. 16 (1940)-..17, 18
Utah Power & Light Co. v. *United States*, 243 U.S. 389 (1917) 17, 18, 20, 22

CONSTITUTION, STATUTES:

U.S. Constitution, Art. IV, § 3 16
American Eagle Protection Act, 16 U.S.C. §§ 668-68d (1970) 15
Black Bass Act, 16 U.S.C. §§ 851-56 (1970) 15
Fish and Game Sanctuary Act, 16 U.S.C. §§ 694-94b (1970) 15
Migratory Bird Conservation Act, 16 U.S.C. § 715 *et seq.* (1970) 15
National Bison Range Act, 16 U.S.C. § 671 (1970) 15
National Environment Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1970) 6
Taylor Grazing Act of 1934, 43 U.S.C. § 315 *et seq.* (1970) 6
Wild, Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. §§ 1331-40 (Supp. II, 1972) 3
Wild Life Conservation Act, 16 U.S.C. § 661-66c (1970) 15
16 U.S.C. § 1 (1970) 15
16 U.S.C. § 60 (1970) 8

Page

16 U.S.C. § 460k (1970) 6
16 U.S.C. § 671 *et seq.* (1970) 7
16 U.S.C. §§ 673-73c (1970) 15
16 U.S.C. § 676 (1970) 8
16 U.S.C. § 682 (1970) 8
16 U.S.C. § 685 (1970) 8
16 U.S.C. § 689b (1970) 8
16 U.S.C. § 692a (1970) 8
16 U.S.C. § 694a (1970) 8
16 U.S.C. § 742j-1 (Supp. III, 1973) 7
16 U.S.C. § 1531-43 (Supp. III, 1973) 7
18 U.S.C. § 471 (1970) 7

CONGRESSIONAL MATERIALS:

Hearings on S. 862, S. 1116, S. 1090 and S. 1119 (Protection of Wild Horses and Burros on Public Lands) Before the Senate Subcomm. on Public Lands of the Comm. of Interior and Insular Affairs, 92nd Cong., 1st Sess. (1971) 5
H.R. Rep. No. 681, 92nd Cong., 1st Sess. (1971) 21
S. Rep. No. 242, 92nd Cong., 1st Sess. (1971) 21

MISCELLANEOUS:

H. Ryden, America's Last Wild Horses (1970) 5

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v.

STATE OF NEW MEXICO, NEW MEXICO STATE LIVESTOCK BOARD, LEE S. GARNER, and CLAUDE FOSTER, *Appellees*

BRIEF OF AMERICAN HORSE PROTECTION ASSOCIATION, AMICUS CURIAE, IN SUPPORT OF APPELLANT

CONSENT

The American Horse Protection Association submits this amicus curiae brief having obtained consent of all the parties to the litigation pursuant to Rule 42(1) of the Supreme Court Rules.

INTEREST OF AMICUS CURIAE

The American Horse Protection Assocation respectfully submits this brief *amicus curiae* in support of the appellant, Rogers C. B. Morton, so that this Court may have the viewpoint of a humane organization knowledgeable in the problems of wild horse and burro protection and preservation, as well as experienced with the evolution of the Wild, Free-

Roaming Horses and Burros Act of 1971 and the enforcement difficulties thereunder.

The American Horse Protection Association (AHPA) is the only national humane organization whose sole purpose is to help insure the welfare and protection of both wild and domestic horses and burros. Founded in 1966, AHPA is a Virginia, non-profit corporation with a membership of over 6,000 persons residing throughout the 50 States. Since its founding, AHPA has been deeply committed to the fight to protect and preserve America's dwindling herds of wild horses and burros. AHPA was involved in the creation of the Pryor Mountain Wild Horse Refuge in 1968, which was the first Federal program undertaken to protect wild horses. In 1970, individual members of AHPA mounted a campaign to inform their individual Congressmen of the harassment and slaughter of wild horses and burros. The Congress responded by enacting the Wild, Free-Roaming Horses and Burros Act of 1971 (the Wild Horse Act). The Act created an advisory board to counsel Federal officials, and the President of AHPA was appointed to serve on it.

Since the passage of the Wild Horse Act, AHPA has been active in monitoring its administration. In April, 1973, AHPA brought the first and only lawsuit seeking to compel enforcement of the Act. The gravamen of that action was the misfeasance and nonfeasance of the Secretaries of Interior and Agriculture and certain of their employees in permitting an illegal roundup and massacre of wild horses in Howe, Idaho. This case did not reach a trial on the merits and is now on appeal in the United States Court of

of Appeals for the District of Columbia Circuit. Furthermore, AHPA has continued to review federal programs concerning wild horses and burros. Its activities include meeting with federal officials, urging stronger enforcement of the Act, and providing on-sight observers for authorized roundups. Finally, members of the AHPA continue to provide information to their Congressmen concerning the progress of protective efforts.

INTRODUCTION AND SUMMARY OF ARGUMENT

The three-judge District Court below determined that Congress was without authority to pass the Wild, Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-40 (Supp. II, 1972). *New Mexico* v. *Morton*, Civil No. 74-127 (D.N.Mex. Feb. 28, 1975). This amicus brief, to the contrary, argues that the Wild Horse Act is one of a series of federal laws validly enacted by virtue of congressional power to legislate with respect to wildlife found on property owned by the United States. It is submitted that in recognition of the broad discretion accorded Congress in the exercise of powers delegated to it by the Territory and Property Clause of the Constitution, and to avoid imperiling an evolving scheme of federal wildlife protection legislation, the decision below must be reversed.

During this century federal legislation has been accepted as appropriate and necessary in some instances to protect and preserve wildlife on federal lands when the States cannot or will not do so effectively. Although the common law traditionally has declared the States to be primarily responsible for the regulation and management of wildlife resources found within

their borders, it also has recognized that important federal interests will supplant State authority. Legislation protecting wildlife on federal lands is one such interest. Congress acts in this regard pursuant to its constitutional duty under the Territory and Property Clause to conserve the national resources it holds and administers in trust for all the people of the United States; these resources include not only the lands owned by the Federal Government but also the wildlife found thereon. Therefore, Congress has authority under the Constitution to legislate to protect wildlife such as the wild horses and burros on federal land. The Wild Horse Act is a proper exercise of that authority, and must be declared constitutional.

ARGUMENT

I.

Wild Horses and Burros Are Part of America's Heritage, and Their Protection by Federal Statute Reflects a Public Policy Favoring National Conservation of Wildlife Resources on Federal Land

The wild horses and burros which roam on the Federal public lands today are a significant part of the heritage of America's Western settlement. America's surviving wild burros are descendants of the abandoned and strayed burros which helped transport our pioneers West, clear land, and till the soil. These burros were also an integral part of the exploration and mining of gold and other valuable minerals which greatly contributed to our Western expansion.

The surviving wild horses are descendants of horses introduced into this country by the early Spanish explorers. From these Spanish mustangs des-

cended the Indian ponies, which, after their abandonment, cross-bred with a mixture of runaway and other abandoned horses and produced the great herds of wild horses that roamed the West early in this century.

In 1900, there were approximately two million wild horses inhabiting the Western plains. By 1969, it was estimated that the number of wild horses had declined to 17,000.[1] This reduction in numbers was the unfortunate result of three factors. First, the westward migration of people and the growth of industry reduced the amount of available grazing land in the Western States. As the amount of grazing land and water decreased, the wild horse became less of a natural resource to the rancher and more of an economic threat. Since the wild horse did not have the economic value of sheep and cattle, the rancher's solution was to kill the horses himself or to allow them to be rounded up by others to be slaughtered for pet food. Second, the wild horses and burros were victimized by certain sportsmen's associations that wanted them removed from secluded game retreats so that they would not compete for the forage and water of game animals. Third, during World War I, the United States rounded up and sold approximately 500,000 horses to our Allies.[2]

Ultimately, Congress, responding to public concern, recognized the gravity of the situation and enacted

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[1] *See Hearings on S. 862, S. 1116, S. 1090 and S. 1119 (Protection of Wild Horses and Burros on Public Lands) Before the Senate Subcomm. on Public Lands of the Comm. of Interior and Insular Affairs,* 92nd Cong., 1st Sess. 70 (1971).

[2] *See generally* H. Ryden, America's Last Wild Horses (1970).

the Wild Free-Roaming Horses and Burros Act of 1971. The Act's preamble declares:

> Congress finds and declares that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and burros are fast disappearing from the American scene. It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands.[3]

Examined in the perspective of other federal legislation, the Wild, Free-Roaming Horses and Burros Act is one of a series of laws in which the Federal Government insured the protection of public lands and wildlife thereon for the benefit and enjoyment of all United States citizens rather than those who reside in particular States or belong to special interest groups. Beginning with the Taylor Grazing Act of 1934, 43 U.S.C. § 315 *et seq.* (1970), and continuing through the National Environment Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1970), and beyond---the evolving policy has been to protect the public's interest in the public's land by mandating the most beneficial uses of federal property. This has been accomplished by allowing recreational uses of public lands and national forests,[4] by setting aside refuges

[3] Pub. L. No. 92-195, § 1, *codified at* 16 U.S.C. § 1331 (Supp. II, 1972).

[4] *See, e.g.*, 16 U.S.C. § 460k (1970).

and sanctuaries for wildlife,[5] and by protecting endangered species and other animals which have been subject to significant decimation.[6] This public policy also includes the protection of animals found on federal lands from cruel and inhumane treatment.[7]

These federal laws acknowledge the necessity for and the benefits derived from the conservation of the public lands and the humane treatment and preservation of the animals found thereon. Furthermore, they recognize that it is the responsibility of the Federal Government to insure that national resources are protected—especially because the States cannot do so uniformly and are unable to withstand the pressures of sporting, commercial or other special interest groups.

The importance of the instant litigation to that federal policy is clear. Once the decision of the New Mexico court was announced, and the federal protection of wild horses seemingly removed, individuals with interests adverse to wild horses reverted to "business as usual" as was practiced prior to the passage of the Wild Horse Act. For example, prior to the entry of the stay of the court's order, numerous applications for wholesale roundups of wild horses and burros by private ranchers were filed with local county boards. Several horses were shot and killed on public lands. A stay of the lower court's order brought a temporary halt to these depredations and saved the lives of hundreds of wild horses. Similarly, a clear pronouncement by this Court affirming the importance

[5] *See, e.g., id.* §§ 671 *et seq.* (1970).

[6] *See, e.g., id.* §§ 1531-43 (Supp. III, 1973).

[7] *See, e.g.*, 18 U.S.C. § 471 (1970); 16 U.S.C. § 742j-1 (Supp. III, 1973).

of the federal policy and declaring the validity of the Wild Horse Act will save the remaining herds of these animals.

AHPA submits that unless this Court reverses the decision of the court below it is not just the wild horses and burros that will face an uncertain and perhaps a dire fate. Past and future legislation enacted pursuant to the Territory and Property Clause establishing national forests and public parks and providing protection for wildlife therein will be susceptible to the same infirmities found in the Wild Horse Act.

Included in this collection of federal statutes are laws to protect wildlife in national parks, in game preserves located on federal land, and in national forests, by prohibiting the hunting, killing, wounding or capturing at any time of any wild bird or animal.[8] Under the rationale of the New Mexico decision, these statutes would be unconstitutional; the Federal Government would not have the inherent power to protect wildlife because these statutes go toward the protection of animals on the land, instead of the land itself. Therefore, only a reversal of the lower court's decision will allow the Congress to maintain the public policy of preserving and protecting the nation's natural resources for the beneficial uses of all of its citizens.

[8] *See, e.g.*, 16 U.S.C. §§ 60, 676, 682, 685, 689b, 692a, 694a, 696 (1970).

II.

The Common Law Doctrine Concerning Ownership of Wild Animals Does Not Prevent Congress From Legislating To Protect Wildlife Found on Property Owned by the United States

Relying on traditional common law doctrine concerning the ownership of wild animals, the three-judge District Court determined that the Wild, Free-Roaming Horses and Burros Act unconstitutionally attempts to make wild horses and burros the property of the Federal Government. The American Horse Protection Association urges that any characterization of federal protection under the Act as advancing a "property" or "ownership" right is inaccurate and misconceives the true nature and purpose of a government's sovereign authority to regulate wildlife. Furthermore, case law development of the common law doctrine indicates that wildlife regulation by the States is not exclusive; federal protective measures, such as the Wild Horse Act, are consistent with common law notions of the control and management of wild animals.

Historically, wild animals (ferae naturae) have been considered to belong in common to the inhabitants of the governmental unit where they were found.[9] They became private property only when reduced to actual possession; in its natural state, wildlife was judged incapable of individual ownership in the ordinary sense of the word.[10] It was recognized, however, that a government could control the taking and subsequent use of wildlife that belonged to its

[9] Geer v. Connecticut, 161 U.S. 519, 522 (1896).

[10] *Id.* at 523, 526-27.

citizens in common.[11] This power, which occasionally has been called a limited form of ownership,[12] was to be exercised in trust for the benefit of all the citizens.[13] The proper role of government regulation, therefore, has been limited to laws necessary and proper to the protection and conservation of its wildlife resources. The government is said to act in a sovereign rather than a proprietary capacity, and may not exercise its powers for the advantage of government as distinct from its citizens, or for the benefit of private individuals as distinguished from the public good.[14]

The principal U.S. case reviewing the common law doctrine is *Geer* v. *Connecticut,* 161 U.S. 519 (1896). In *Geer* the Supreme Court determined that the traditional common law analysis was carried forward in the United States and authorized the States to regulate wildlife in trust for their citizens:

> Undoubtedly, this attribute of government to control the taking of animals ferae naturae, which was thus recognized and enforced by the common law of England, was vested in the colonial governments, where not denied by their charters, or in conflict with grants of the royal prerogative. It is also certain that the power which the colonies thus possessed passed to the states with the separation from the mother country, and remains in them at the present day, *in so far as its exercise*

[11] *Id.* at 522, 523; Lacoste v. Dep't of Conservation, 263 U.S. 545, 549 (1924).

[12] *See* Lacoste v. Dep't of Conservation, 263 U.S. 545, 549 (1924); McCready v. Virginia, 94 U.S. 391, 394-95 (1876).

[13] Geer v. Connecticut, 161 U.S. 519, 529 (1896).

[14] *Id.*

> *may be not incompatible with, or restricted by, the rights conveyed to the federal government by the constitution.*

161 U.S. at 527-28 (emphasis added).

The central question, therefore, is whether the power vested in the States to control and manage wildlife, as announced by *Geer,* prevents Congress from protecting wildlife found on property owned by the United States.

The Supreme Court has recognized that the "ownership" theory of the *Geer* case is essentially a legal shorthand expressing the importance to its people that a State preserve and regulate the exploitation of an important resource.[15] The States' power to protect and preserve their wildlife resources, however, is not absolute; instead, as *Geer* and subsequent cases have recognized, the exercise of state power may be limited by, or incompatible with, powers possessed by the Federal Government.[16] A brief review of these cases indicates that the common law doctrine is not determinative of the Federal Government's power to regulate with respect to wild animals.

First, it is clear that a State's attempt to preserve its wildlife resources may be challenged on constitutional grounds by a defendant charged with violating the state regulatory scheme. Two cases decided since *Geer* have found state wildlife statutes sufficiently discriminatory against out-of-state residents or aliens to

[15] Toomer v. Witsell, 334 U.S. 385, 402 (1948).

[16] Geer v. Connecticut, 161 U.S. 519, 527-28 (1896). *See* Lacoste v. Dep't of Conservation, 263 U.S. 545 (1924); Hunt v. United States, 278 U.S. 96 (1928).

constitute a denial of the guarantees of the Privileges and Immunities Clause of Article IV of the Constitution,[17] or of statutory rights based on the Equal Protection Clause of the Fourteenth Amendment.[18] Despite the strong common law tradition of state "ownership" of wildlife in trust for its citizens, the Supreme Court there refused to create an exception to important federal rights in order to advance a State's interest in regulating wildlife in a manner the State had determined to be in the best interests of its citizens.[19] Also important in these cases was the fact that the State was attempting to regulate in an area outside its exclusive jurisdiction—the three-mile offshore belt of territorial sea.[20]

Other cases, including *Geer,* have sustained state wildlife regulation against challenges that the State law was an unconstitutional infringement of Congress' power to regulate interstate commerce.[21] However, in these cases the Court found that the effect of the State legislation was principally or entirely intrastate and that no burden on interstate commerce was created. Accordingly, since no federal interest was affected, the State's interest in regulating the

[17] Toomer v. Witsell, 334 U.S. 385 (1948).

[18] Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948).

[19] See Toomer v. Witsell, 334 U.S. 385, 402; Takashashi v. Fish and Game Commission, 334 U.S. 410, 421.

[20] *Cf.* United States v. California, 332 U.S. 19 (1947); Alabama v. Texas, 347 U.S. 272 (1954).

[21] McCready v. Virginia, 94 U.S. 391 (1876) (also involving a challenge under the privileges and immunities clause of Article IV of the Constitution); Geer v. Connecticut, 161 U.S. 519 (1896); Lacoste v. Dep't of Conservation, 263 U.S. 545 (1924).

manner in which its wildlife resources were exploited could be given effect.

Second, federal legislation designed to preserve and protect wildlife has been upheld when enacted pursuant to the exercise of a power delegated to the United States by the Constitution. The principal case supporting this proposition is *Missouri* v. *Holland,* 252 U.S. 416 (1920), in which the Supreme Court sustained the validity of federal legislation enacted to enforce the provisions of a treaty between the U.S. and Great Britain protecting migratory wild birds. The Court found that the United States' exercise of its constitutional authority to enter into treaties of this type did not contravene the Tenth Amendment, stating:

> No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean on a slender reed. . . . No doubt the great body of private relationships usually fall within the control of the State, but a treaty may override its power.

252 U.S. at 434.

Finally, the Federal Government may ignore the provisions of state wildlife legislation when acting to preserve or protect property owned by the United States. The Supreme Court has held that congressional power to legislate with respect to federal territories or property and to delegate authority to enforce the legislation is sufficiently broad to override conflicting state game laws or other statutes.[22] Further-

[22] Hunt v. United States, 278 U.S. 96 (1928); see Chalk v. United States, 114 F. 2d 207 (4th Cir. 1940).

more, the exercise of federal power is not limited to situations in which federal property already has been damaged; the United States may act, without regard for contrary state law, to protect its property against potential depredation.[23]

The cases defining the scope of the common law doctrine of regulatory authority over wild animals make it clear that the States do not "own" wildlife in any meaningful sense; they exercise their sovereign power on behalf of their inhabitants to protect and preserve their wildlife resources. The artificial property concepts that sometimes have found expression in early cases have given way in more recent cases to a realistic evaluation of the limits of the States' power to regulate wildlife. Cases invoking the doctrine in its strictest form, such as *Geer* v. *Connecticut,* have done so on facts in which the interest of the Federal Government was found to be minimal or totally absent. However, when state wildlife legislation clearly has infringed upon a constitutional guarantee or has attempted to regulate outside the limits of the States' exclusive jurisdiction—in the three-mile territorial sea, or on property owned by the United States—federal interests were found sufficient to override state interests in preserving or protecting wildlife. Similarly, when the Congress has enacted affirmative protective legislation pursuant to its constitutional powers, otherwise valid state legislation may be denied effect to the extent that it conflicts with federal law. Therefore, the common law doctrine should not be interpreted to foreclose Congress from legislating to protect wildlife found on property

[23] New Mexico State Game Commission v. Udall, 410 F. 2d 1197 (10th Cir. 1969).

owned by the United States, provided there is an adequate constitutional delegation of authority to do so.

Public policy also demands that the Federal Government be permitted to protect and preserve wildlife resources. As we have noted in Part I, since 1896, when *Geer* v. *Connecticut* was decided, the United States has come to realize that federal legislation may be necessary to protect the environment and wildlife when state efforts are ineffective or at cross-purposes, or when reliance on the States is futile. This is the teaching of *Missouri* v. *Holland,*[24] and the large number of federal statutes encouraging wildlife conservation and protecting particular species enacted during this century further attest to the fact that federal regulations concerning wildlife are desirable in certain situations.[25] Undeveloped lands in which wildlife can flourish are fewer today than in the nineteenth century, and wild animals less numerous. In some States particular species have vanished altogether. The citizens of the United States now realize that wildlife protection and preservation is a national as well as a State problem. For that reason, federal efforts on behalf of wild animals should not be impeded by a doctrine whose roots are in an era when ecological concerns were unknown.

[24] *See* 252 U.S. at 435.

[25] *See, e.g.,* the Wild Life Conservation Act, 16 U.S.C. §§ 661-66c (1970); the American Eagle Protection Act, 16 U.S.C. §§ 668-68d (1970); the National Bison Range Act, 16 U.S.C. § 671 (1970); 16 U.S.C. §§ 673-73c (1970), creating the Wyoming Elk Reserve; the Fish and Game Sanctuary Act, 16 U.S.C. §§ 694-94b (1970); Migratory Bird Conservation Act, 16 U.S.C. § 715 *et seq.* (1970; and the Black Bass Act, 16 U.S.C. §§ 851-56 (1970). *See also* 16 U.S.C. § 1, which authorizes the National Parks Service to promote and regulate the federal parklands to conserve the wildlife found therein.

The Wild, Free-Roaming Horses and Burros Act is one example of desirable and appropriate federal protective legislation. The Congress was responding to a demonstrable need for federal protection of a national resource, in a manner consistent with the purposes for which the common law doctrine of governmental wildlife regulation was formulated. To characterize this as asserting a property interest in animals "owned" by the States is misleading. Congress acted pursuant to its constitutional power to legislate with respect to federal lands and wildlife therein held in trust for the people of the United States, not out of any ownership right in the animals. Therefore, the Wild Horse Act supersedes conflicting state regulation of wildlife.

III.

Congress, in the Exercise of Its Constitutional Power To Make Rules and Regulations Respecting Property Belonging to the United States, May Also Enact Legislation Protecting Wildlife Found on Federal Lands

The District Court found, as a second ground for its holding, that Congress was without constitutional power to legislate to protect wild animals. However, the Territory and Property Clause of the United States Constitution[26] endows Congress with sufficient power to enact laws protecting wildlife found on property owned by the United States.

Congress's authority to regulate public lands entrusted to it traditionally has been recognized to be

[26] U.S. Const. art. IV, § 3.

"complete" and "without limitation".[27] Among other powers, Congress may control the occupancy and use of the public domain, protect it from trespass and injury, and prescribe the conditions upon which others may obtain rights in it.[28] This authority has been described as analogous to the police power possessed by the States, and may be exercised according to the exigencies of the particular case.[29] The Supreme Court's uniformly liberal construction of the Territory and Property Clause indicates that Congress has exceedingly broad discretion to deal with matters concerning lands belonging to the United States. In fact, several cases have stated that the administration of entrusted public lands is solely a matter for Congress, not the courts, to determine.[30] Legislation protecting wildlife found on federal property, therefore, is entirely consistent with Congress's extensive authority under the Territory and Property Clause.

Although congressional authority to legislate to protect wildlife appears clear, this Court has never specifically decided the issue. The majority of cases decided under the Territory and Property Clause have been concerned primarily with Congress's power to dispose of the public domain or to protect the land itself from trespass, detrimental use, or some other

[27] United States v. San Francisco, 310 U.S. 16, 29-30 (1940). *See* Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1917); Hunt v. United States, 278 U.S. 96, 100 (1928).

[28] Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917); United States v. San Francisco, 310 U.S. 16, 29-30 (1940).

[29] Camfield v. United States, 167 U.S. 518, 525 (1897).

[30] Light v. United States, 220 U.S. 523, 537 (1911); United States v. San Francisco, 310 U.S. 16, 29 (1940).

danger.[31] The District Court interpreted these decisions to limit the exercise of congressional authority to legislation designed to protect the public lands; because it failed to find a similar purpose for the Wild Horse Act, the court below decided that the Act was unconstitutional. However, the language of the Territory and Property Clause does not compel such a restrictive reading. Rules and regulations "respecting" property belonging to the United States need not be confined necessarily to those which protect only federal land from damage of some kind. Congress could rationally conclude that wild animals on that land were in need of federal protection. If it did so, its powers under the Constitution are sufficient to support such legislation.[32]

At least one judicial decision lends support to this proposition. In *New Mexico State Game Commission* v. *Udall,* 410 F.2d 1197 (1969), the Court of Appeals for the Tenth Circuit held that the statutory authority vested in the Secretary of the Interior to promote and regulate the national parks to "conserve the scenery *and wildlife therein*" was broad enough to permit him to manage wild deer herds and to ignore otherwise valid state game laws.[33] This is but a short

[31] *See, e.g.,* United States v. San Francisco, 310 U.S. 16 (1940) (power to set restrictions on disposal of the public domain); Utah Power & Light Co. v. United States, 243 U.S. 389 (1917) (power to enjoin occupancy and use of federal lands without permission or license); Light v. United States, 220 U.S. 523 (1911) (power to enjoin trespass); F.P.C. v. Idaho Power Co., 344 U.S. 17 (1952) (power to condition use of federal land on restrictions designed to protect and conserve resources).

[32] *Cf.* F.P.C. v. Idaho Power Co., 344 U.S. 17, 23 (1952).

[33] 410 F. 2d at 1200 (emphasis added).

step from holding that affirmative federal statutes protecting wildlife found on federal land are valid exercises of Congress's power. Other cases discussing the Federal Government's power to regulate concerning wild animals despite conflicting state legislation are not to the contrary. These involved existing serious damage to federal property which required that U.S. officials act to protect public land. While the holdings of these cases were expressed in terms concerning the land itself, they clearly did not make the necessity of protecting the land a condition precedent to federal legislation.[34]

Finally, an exercise of congressional authority to regulate wildlife, even if in conflict with otherwise valid state legislation, is not an unconstitutional infringement of rights reserved to the States by the Tenth Amendment. As we have shown in Part II, the States' power to regulate with respect to wildlife is not absolute, and may be overridden by the proper exercise of a power delegated to the United States. This is simply one instance exemplifying the more general proposition that whenever the Federal Government acts within a delegated power, it may supersede countervailing state interests, whether they be characterized as governmental or proprietary.[35] With respect to lands belonging to the United States, the Supreme Court has recognized that even though for some purposes a State has jurisdiction over them, its jurisdiction does not extend in any manner that is inconsistent with the full power of Congress to legis-

[34] *See* Hunt v. United States, 278 U.S. 96 (1928); Chalk v. United States, 114 F.2d 207 (4th Cir. 1940).

[35] Maryland v. Wirtz, 392 U.S. 183, 195 (1968).

late under the Territory and Property Clause.[36] Therefore, to the extent that power to regulate wildlife found on public lands is conferred by the Constitution, "it is manifest that the Tenth Amendment is not applicable."[37]

The public policy mandating federal protection of wildlife likewise requires that congressional legislation supersede state law. If Congress is to protect and administer effectively its public trust over federal lands and the wildlife therein, it must do so uniformly and in a manner that enables animals found on federal lands in only a few States to be protected for the enjoyment of people in the rest of the Nation. If federal legislation were to be subject to the conflicting provisions of a variety of state laws, Congress's constitutional powers would be nullified. As the Supreme Court has stated:

> We do not think that the admission of a Territory as a State deprives [Congress] of the power of legislating for the protection of the public lands, though it may involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of state legislation.

Camfield v. *United States,* 167 U.S. 518, 526 (1897).

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[36] Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1917).

[37] Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 330 (1936).

IV.

The Wild Free-Roaming Horses and Burros Act Is a Proper Exercise of Congressional Authority Under the Territory and Property Clause

The language and legislative history of the Wild Free-Roaming Horses and Burros Act clearly indicate that Congress intended to base the Act upon its authority under the Territory and Property Clause. The Act states that to accomplish the protection of wild horses and burros they are to be considered as an integral part of the natural system of the public lands on which they are found;[38] it authorizes the Secretaries of Agriculture and Interior to protect and manage the animals as components of the public lands.[39] Reports explaining the Act issued by the Senate Committee on the Interior and Insular Affairs and the House-Senate Conference Committee employ similar language.[40]

The individual provisions of the Act all are within the scope of congressional authority under the Territory and Property Clause. The Act does not declare wild horses and burros, as defined, to be owned by the United States; instead, in a manner analogous to the exercise of State authority under the common law, the Act asserts the United States' sovereign right to protect and preserve a national wildlife resource. The definition of the animals brought within the jurisdic-

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[38] Pub. L. No. 92-195, § 1, *codified at* 16 U.S.C. § 1331 (Supp. II, 1972).

[39] *Id.* § 3(a), *codified at* 16 U.S.C. § 1333(a).

[40] *See* S. Rep. No. 242, 92d Cong., 1st Sess. 3 (1971); H.R. Rep. No. 681, 92d Cong., 1st Sess. 5 (1971).

tion of the Secretaries of Agriculture and Interior is limited to those on the public lands of the United States, thereby restricting the exercise of federal power to the confines of constitutional authority.[41] The various management powers delegated are to take place on public lands, and are intended to protect or preserve the lands themselves or the wild horses and burros found on them.[42]

To the extent that the Act authorizes federal officials to conduct management functions outside the limits of federal property, it is clearly supported by case law interpretation of the Territory and Property Clause. The Supreme Court has held that, in the exercise of its powers to protect and control federal property, Congress may regulate or forbid certain conduct on private property adjacent to public lands, and may authorize entry onto private property to abate a nuisance or remove a threat.[43] As well, Congress may criminally punish conduct that is inconsistent with the proper protection of federal land.[44] In the exercise of its power to forbid trespass, Congress may forbid entry onto federal property for illegal purposes.[45] The scope of congressional authority under the Territory and Property Clause, therefore, is comprehensive enough to and does encompass

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[41] *See* Pub. L. No. 92-195, § 2(b), *codified at* 16 U.S.C. § 1332(b).

[42] *Id.* § 3, *codified at* 16 U.S.C. § 1333.

[43] United States v. Alford, 274 U.S. 264 (1927); Camfield v. United States, 167 U.S. 518 (1897).

[44] McKelvey v. United States, 260 U.S. 353 (1922).

[45] *Id. Cf.* Light v. United States, 220 U.S. 523 (1911); Utah Power & Light Co. v. United States. 243 U.S. 389 (1917).

the provisions of the Wild, Free-Roaming Horses and Burros Act.

CONCLUSION

For the above-stated reasons, this Court should find the Wild, Free-Roaming Horses and Burros Act to be a valid exercise of congressional authority and should reverse the decision of the New Mexico District Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1488

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,
Appellant

v.

STATE OF NEW MEXICO, ET AL., *Appellees*

On Appeal from the United States District Court for the District of New Mexico

BRIEF OF AMICUS CURIAE, INTERNATIONAL ASSOCIATION OF GAME, FISH AND CONSERVATION COMMISSIONERS

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AUTHORITIES CITED

Page

CASES:

Andrews v. Smith, 324 Pa. 455, 188 A. 146 (1936) 6
Fields v. Wilson, 186 Or. 491, 207 P.2d 153 (1949) 5
Geer v. Connecticut, 161 U.S. 519 (1896) 4, 7
King v. Arlington County, 195 Va. 1084, 81 S.E. 2d 587 (1954) 7
Maryland Dept. of Natural Resources v. Amerada Hess Corp., 350 F.Supp. 1060 (D. Md. 1972) 7
New Mexico State Game Comm'n v. Udall, 410 F.2d 1197 (10th Cir. 1969) 4, 7
Omaechevarria v. Idaho, 246 U.S. 343 (1918) 7
People v. Dello, 71 N.Y.S. 2d 145 (1947) 5
State ex rel. Sofeico v. Heffernan, 41 N.M. 219, 67 P. 2d 240 (1937) 7
Tamburello v. Jaeger, 249 La. 25, 184 So. 2d 544 (1966) 5
United States v. Plott, 345 F. Supp. 1229 (S. D. N. Y., 1972) 7
Utah Power & Light Co. v. United States, 243 U.S. 389 (1917) 8
Yazoo & Mississippi Valley R. Co. v. Gordon, 184 Miss. 885, 186 So. 631 (1939) 5

CONSTITUTION, STATUTES:

U.S. Constitution, Article IV, Section 3, Clause 2 .. 3, 4, 8, 9
U.S. Constitution, Article I, Section 8, Clause 3 9

FEDERAL:

§ 1, Multiple-Use Sustained Yield Act of 1960, 74 Stat. 215, 16 U.S.C. § 528 3
§ 4(c), National Wildlife Refuge System Administration Act of 1966, 80 Stat. 927, 16 U.S.C. § 668 dd(c) (1970) 2, 3

	Page
Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. § 1331-1340 (Supp. II, 1972)	4, 7
§ 5, 78 Stat. 1040, 16 U.S.C. § 460n-4 (1970)	3
§ 6, 79 Stat. 614, 16 U.S.C. § 460o-5 (1970)	3
§ 4, 82 Stat. 904, 16 U.S.C. § 460w-4 (1970)	3
STATE:	
Arizona Rev. Stat. Ann. (1952) § 24-311	6
Rev. Codes of Montana (1947), Title 46, §§ 1001, 1005	6
21 Nevada Rev. Stat. (1974), §§ 569.005, 569.010	6
New Mexico Stat. Ann. (1953), § 47-14-1	6
Utah Code Ann. (1953), §§ 47-2-1, 47-2-5	6
Wyoming Stat. § 11-500 (~~1963~~ 1975 Cum. Supp.)	6
MISCELLANEOUS:	
2 Blackstone, *Commentaries*	5
2 Kent, *Commentaries*	5
McKnight, Feral Livestock in Anglo-America, University of California Press, (1964)	5
Natchez Trace Parkway, 58 I.D. 467, 472 (1943) (Opinion of Gardner, Solicitor)	8
Pufendorf, Law of Nature and Nations	5

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BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF GAME, FISH AND CONSERVATION COMMISSIONERS

CONSENT

The International Association of Game, Fish and Conservation Commissioners (hereinafter "the Association") submits this brief amicus curiae having obtained consent of all parties pursuant to Rule 42(1) of the Supreme Court Rules.

INTEREST OF AMICUS ASSOCIATION

The Association is a voluntary, unincorporated association dedicated to coordinating the efforts of public administrative agencies responsible for the protection and management of the fish and wildlife of North America. Founded at Yellowstone National Park in 1902, the Association numbers among its government members the wildlife agencies of all fifty states, five Canadian provinces, the Commonwealth of Puerto Rico, and the Republic of Mexico, as well as the U.S. Fish and Wildlife Service and the Canadian (dominion) Wildlife Service.

With the recent surge of national interest in environmental matters the Congress has been active in enacting legislation relating to fish and wildlife. For historical and policy reasons, as well as reasons rooted in the Constitution's distribution of power between the United States and the several States, Congress has been deferential to state authority and jurisdiction with respect to fish and resident wildlife. In the course thereof Congress has deliberately enacted legislation which reflects a pervasive policy of coordination between federal and state authority over wildlife, including wildlife found on federally owned lands. Thus, for example, in the National Wildlife Refuge System Administration Act of 1966, being an organic act for management of units of federal land in virtually every state set aside primarily as breeding or resting grounds for migratory waterfowl, it is provided:

> The regulations permitting hunting and fishing of resident fish and wildlife within the System shall be, to the extent practicable, consistent with State fish and wildlife laws and regulations. The provisions of this Act shall not be construed as affecting the authority, jurisdiction, or responsibility

> of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System.

80 Stat. 927, 16 U.S.C. § 668dd(c). Similarly, in the numerous legislative enactments establishing units of the National Recreation Area System, being a federally owned system of outstanding natural areas designed primarily to meet regional recreation requirements, it is typically provided that hunting, fishing and trapping shall be permitte' "in accordance with applicable laws of the United States and the respective states." E.g., § 5, 78 Stat. 1040, 16 U.S.C. § 460n-4 (Lake Mead NRA); § 6, 79 Stat. 6i4, 16 U.S.C. § 460o-5 (Delaware Water Gap NRA); § 4, 82 Stat. 904, 16 U.S.C. § 460w-4 (Flaming Gorge NRA). Finally, with respect to the National Forests, Congress in the Multiple Use-Sustained Yield Act of 1960 has declared its policy that "the national forests shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes," adding that: "Nothing herein shall be construed as affecting the jurisdiction of the several States with respect to wildlife and fish on the national forests." § 1, 74 Stat. 215, 16 U.S.C. § 528.

The Association's interest herein is thus twofold: (1) to support congressional power in the instant case pursuant to the Property Clause of the Constitution, article IV, section 3, clause 2, to protect animals found on the public domain; and (2) to draw the Court's attention to the firmly established legal distinction between wildlife and feral animals and the corresponding difference in the measure of State authority over wildlife and feral animals.

STATEMENT OF THE CASE

Amicus Association adopts the Statement as presented by federal appellants in their Jurisdictional Statement.

ARGUMENT

As Applied in the Instant Case, the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (Supp. II) Is a Valid Exercise of Authority Under the Property Clause

A. Traditional Doctrines Concerning State Authority Over Wildlife Are Not Involved in This Case.

In holding unconstitutional the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (Supp. II), the District Court held that the congressional attempt therein to regulate horses and burros on public land conflicted with historical interpretation of the Property Clause of the Constitution, article IV, section 3, clause 2, as well as traditional doctrines concerning wild animals. Relying on *Geer* v. *Connecticut,* 161 U.S. 519 (1896), and *New Mexico State Game Comm'n* v. *Udall,* 410 F.2d 1197 (10th Cir. 1969), cases enunciating the doctrine that wildlife is owned by the state in its sovereign capacity in trust for the benefit of its people, the court held that wild horses and burros do not become "property" of the United States simply by being present on its land. Amicus submits that the *Geer* doctrine remains sound law but that it is simply inapposite because the burros involved herein are feral animals not wildlife.

Through negligence or mischance, man has been responsible for the accidental introduction of a number of exotic animals in varied parts of the world. Outstanding among these accidental introductions has been the reversion of livestock to a feral existence and on all continents various livestock species have occasionally wandered from confinement and taken to a "wild" life. McKnight, Feral Livestock in Anglo-America, University of California Press 1 (1964). Perhaps the hardiest of all the feral exotics is the "wild" burro (Equus asinus), scattered throughout the western states and descendants of domesticated burros which had been prized by early prospectors and explorers. McKnight, op. cit. supra, at 21.

At common law a distinction was drawn between animals "ferae naturae" and animals "domitae naturae" (sometimes also referred to as "mansuetae naturae"). "Ferae naturae" are animals which by nature are wild or of a wild nature or disposition as distinguished from "domitae naturae" which are naturally tame animals. The distinction with attendant differences in legal consequences is found crystallized in the classical writers as early as the seventeenth century in Pufendorf's Law of Nature and Nations, Bk. IV, ch. 6, § 5, and is carried forward by Blackstone, 2 Blackstone, Commentaries § 391, and Chancellor Kent. Kent sets forth the common law rule that ownership of domesticated animals is an absolute property right whereas ownership of animals ferae naturae is in no individual and thus is held to be in the state in its sovereign capacity in trust for the benefit of its people. 2 Kent, Commentaries § 347. The distinction is carried forward in the American decisions. E.g., *Tamburello* v. *Jaeger,* 249 La. 25, 184 So. 2d 544 (1966); *Yazoo & Mississippi Valley R. Co.* v. *Gordon,* 184 Miss. 885, 186 So. 631 (1939); *People* v. *Dello,* 71 N.Y.S. 2d 145 (1947); *Fields* v. *Wilson,* 186 Or. 491, 207 P.2d

153 (1949); *Andrews* v. *Smith,* 324 Pa. 455, 188 A. 146 (1936).

In these circumstances, therefore, it is not fortuitous that state authority over the burros in the instant case was exercised not by the New Mexico Department of Game and Fish but by the New Mexico Livestock Board. And it is for the same reason, viz., that horses and burros are not considered wildlife, that the statutes of other western states vest authority over estrays in state livestock boards, not in the state wildlife agency. E.g., Ariz. Rev. Stats. Ann. (1952) § 24-311 (authority vested in Boards of County Commissioners); Rev. Codes of Montana (1947), Title 46-1001, 1005 (authority in livestock commissions); 21 Nevada Rev. Stats. (1974) §§ 569.005, 569.010 (authority vested in Department of Agriculture); Wyoming Stats. § 11-500 (1973 Cum. Supp.) (authority vested in Livestock Sanitary Board); Utah Code Ann. (1953) §§ 47-2-1, 47-2-5 (authority vested in Boards of County Commissioners). Much as the statutes cited above, the New Mexico statute defines "estray" as:

> Any bovine animal, horse, mule or ass, found running at large upon public or private lands, either fenced or unfenced, in the state of New Mexico, whose owner is unknown in the section where found . . . or that is branded with a brand which is not on record in the office of the cattle sanitary board of New Mexico, shall be known as an "estray"....

New Mexico Stats. Ann. (1953) § 47-14-1. From the foregoing it is evident that state agencies established to manage and protect wildlife do not exercise authority over estrays for the simple reason that such animals are not ferae naturae. Nor is the distinction one without a difference. Authority of the state over wildlife rests on a dual basis: ownership in trust and police power. *Geer* v. *Connecticut,* supra, *New Mexico State Game Comm'n* v. *Udall,* supra; *United States* v. *Plott,* 345 F. Supp. 1229 (S.D.N.Y. 1972); *Maryland Dept. of Natural Resources* v. *Amerada Hess Corp.,* 350 F. Supp. 1060 (D.Md. 1972). By contrast, state authority over estrays stems solely from police power. *King* v. *Arlington County,* 195 Va. 1084, 81 S.E.2d 587 (1954). As stated by Mr. Justice Brandeis in *Omaechevarria* v. *Idaho,* 246 U.S. 343, 346 (1918): "The police power of the State extends over the federal public domain, at least when there is no legislation by Congress on the subject." Accordingly, the wildlife decisions relied upon by the District Court are inapposite to resolution of the instant case.

B. Provisions of the Wild Free-Roaming Horses and Burros Act Plainly Demonstrate that Horses and Burros Are Not Wildlife

Section 5 of the Act provides that "a person claiming ownership of a horse or burro on the public lands shall be entitled to recover it only if recovery is permissible under the branding and estray laws of the State in which the animal is found." 16 U.S.C. § 1335. The foregoing provision is clearly consistent with the concept of absolute property rights which an individual may possess in animals "domitae naturae" and equally inconsistent with the common law doctrine of animals "ferae naturae" which holds that wildlife is not the object of private ownership. *Geer* v. *Connecticut,* 161 U.S. at 527-529; *State ex rel. Sofeico* v. *Heffernan,* 41 N.M. 219, 67 P.2d 240 (1937).

C. The Proprietary Interest of the United States Is an Adequate Basis of Authority To Protect Burros Found on the Public Domain

The instant case involves burros found on the public domain. It does not involve an assertion of federal authority with respect to burros at one time found on the public domain but found elsewhere at the operative moment. Amicus submits that congressional power to deal with the instant situation springs from the Property Clause which empowers Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" art. IV, sec. 3, cl. 2. The United States may gain a proprietary interest in land within a state and, in the exercise of such interest, the United States as a sovereign possesses power to protect the land as well as feral animals found thereon by the enactment of reasonable and appropriate ("needful") legislation. *Utah Power & Light Co.* v. *United States,* 243 U.S. 389 (1917). The proprietary control which the federal government may exercise where primary jurisdiction remains in the state is, of course, limited to powers which are reasonably related to the protection and use of its property. "As such, it is generally cognate with the control which any private landowner may exercise over the use of his own land, the chief difference being simply that the United States is constitutionally authorized to enforce its control in the Federal courts, whereas a private landowner is generally limited to the State courts." Natchez Trace Parkway, 58 I.D. 467, 472 (1943) (opinion of Gardner, Solicitor).

Amicus submits that the proprietary interest of the United States provides adequate authority for the protection of burros found on public lands. It is unnecessary to look beyond the Property Clause to the Commerce Clause for such power for the reasons that the latter power was not invoked by Congress and, more importantly, the subject matter is plainly of a local nature.

CONCLUSION

For the reasons set forth above, probable jurisdiction should be noted.

Respectfully submitted,

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August 13, 1975

APPENDIX

Supreme Court, U. S.
FILED
DEC 1 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1488

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR,
Appellant

—*v.*—

STATE OF NEW MEXICO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JURISDICTIONAL STATEMENT FILED MAY 27, 1975
PROBABLE JURISDICTION NOTED OCTOBER 6, 1975

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INDEX[1]

	Page
Docket entries	1
Complaint filed March 4, 1974	6
Amended complaint filed March 11, 1974	13
Answer filed May 20, 1974	17
Appellant's motion to dismiss or in alternative for summary judgment filed October 29, 1974	20

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[1] The opinion, judgment, and first amended judgment of the district court are reproduced as Appendices A, B, and D, respectively, of the Jurisdictional Statement. The appellant's notice of appeal and supplemental notice of appeal are reproduced as Appendices C and E, respectively, of the Jurisdictional Statement.

INDEX

	Page
Appellees' motion for summary judgment filed November 20, 1974	22
Transcript of proceedings of September 30, 1974	24
Appellees' Exhibit 1	64
Appellees' Exhibit 2	66
Appellees' Exhibit 3	69
Appellees' Exhibit 4	71
Appellees' Exhibit 5	74
Appellees' Exhibit 6	79
Appellees' Exhibit 7	81
Appellees' Exhibit 12	83
Appellant's Exibit A	85
Order entered March 7, 1975	90
Appellant's motion for stay pending appeal March 18, 1975	91
Order noting probable jurisdiction	93

DOCKET ENTRIES

DATE

3-4-74 Complaint for injunctive and declaratory relief; JS-5 to Order convening of three-judge court.

Summons, original and five copies, issued and delivered to Marshal for service.

3-11-74 Amendment to Complaint. Original and three copies. Copies lodged in file.

3-15-74 Marshal's return of service on Victor R. Ortega, U.S. Attorney, on 3-7-74.

3-15-74 Marshal's return of service on Attorney General of the United States by certified mail and on the Secretary of the Interior of the United States also by certified mail on 3-7-74.

3-15-74 Plaintiffs' Motion to dismiss certain defendant.

Order that defendant Victor R. Ortega, U.S. Attorney, is dismissed from action. (MECHEM) Copies mailed to counsel.

3-19-74 Defendants' Response to Motion to Dismiss.

4-3-74 Order that the action is to be heard and determined by a three-judge court to be constituted as follows: Judge Oliver Seth, Judge H. Vearle Payne, and Judge Edwin L. Mechem. (DAVID T. LEWIS) Copies of all pleadings and order forwarded to Judge Seth and Judge Mechem. Copy of order forwarded to Judge Payne.

4-11-74 Set for Hearing (3 Judges) on May 3, 1974, at 1:30 P.M.

4-25-74 Defendants' Motion to Vacate Hearing of May 3, 1974.

Order that the hearing in this action scheduled for May 3, 1974 is vacated (PAYNE)

Copies of Order sent to counsel.

Copies of above motion and order sent to three judges.

DATE

4-25-74 3 Judge Hearing (5-3-74) vacated.

5-3-74 Defendants' Motion for extension of time of 15 days from May 6, 1974 to answer complaint. Copies sent to 3 Judges.

Order granting above motion. (PAYNE). Copies sent counsel and to three Judges.

5-20-74 Defendants' Answer. Copies sent to all three judges.

8-3-74 Set for Non-Jury trial 9-30-74. Notice given.

9-30-74 Albuquerque: Three Judge Court, Seth, Payne and Mechem/H. Henry, reporter. 3:38 P.M. called for Hearing. George Harris appears for Plaintiff and Jim Grant, Assistant U. S. Attorney, for Defendants. Opening Statements waived. Plaintiff calls witness Garner to which Defendant objects stating matter to be heard on arguments only. OVERRULED. Case proceeds as *non-jury trial.* Plaintiff's evidence presented. Witnesses sworn; 4:56 P.M. Plaintiff rests, defendant presents no evidence and moves to dismiss. Plaintiff reopens. Witness sworn. 5:03 P.M. evidence concluded. Plaintiff files Memorandum Brief. Defendant renews motion to dismiss or in the alternative ro remand case to original assigned judge—taken under advisement. Defendant to file Brief in 20 days, and Plaintiff to file Reply Brief in 5 days thereafter. Case taken under advisement. 5:09 P.M. Recess.

Plaintiffs' Exhibit 1 through 12.

Defendants' Exhibits A and C.

Plaintiffs' Memorandum Brief.

10-16-74 Plaintiffs' Supplemental Trial Brief. Copies sent to Three Judges.

Defendant's Motion for extension of time to answer.

Order that the United States of America is granted an extension of time within which to answer until one week from October 20, 1974. (PAYNE)

Copies of Motion and Order sent to three Judges.

DATE

10-29-74 Defendants' Motion to Dismiss, or in the Alternative for summary judgment. Copies sent to three judges.

Memorandum Brief in support of above motion. Copies sent to three judges.

11-8-74 Plaintiffs' Motion for extension of time for one week to November 18, 1974 to respond to defendants' motion and Brief.

11-8-74 Order approving above motion. (PAYNE)

Copies of above motion and order sent to counsel and to three judges.

11-9-74 Plaintiffs' Motion for extension of time to November 20, 1974 to respond to Defendants' Motion and Brief.

Order granting above motion. (PAYNE)

Copies of order sent to counsel. Copies of motion and order sent to three judges.

11-20-74 Plaintiffs' Motion for Summary Judgment.

Affidavit of Lee S. Garner.

Plaintiffs' Reply Brief.

Copies of above sent to three judges.

2-28-75 Court's Memorandum Opinion. Copies sent to counsel.

Judgment that the Wild Free-Roaming Horses and Burros Act, Section 1331 through 1340, Title 16, USC, is declared unconstitutional. Defendants are permanently enjoined from enforcing or executing the operation of the act; and each party to bear its own costs. (SETH, PAYNE & MECHEM)

Copies of above order sent to counsel.

FINAL DOCKET JS 6

3-7-75 Order that the judgment filed on February 28, 1975 is stayed until further order of this Court. (PAYNE, MECHEM. Approved by Judge Seth by phone)

Copies of Order sent to counsel.

Copies of above order sent to three judges.

DATE

3-10-75 Defendant's Motion to Amend or Alter Judgment.

Copies of motion sent to three Judges.

3-18-75 Defendants' Motion to Stay Judgment pending Appeal. Affidavit of James Gabettas and D. Dean Bibles.

Copies of motion sent to three judges.

3-27-75 Plaintiffs Motion to Strike Affidavits. Copies to three judges.

Plaintiffs Response to Defendants' Motion for Stay.

3-28-75 Defendant's Notice of Appeal to the Supreme Court of the United States from Judgment entered 2-28-75.

3-31-75 Order that Victor R. Ortega, United States Attorney for the District of New Mexico, dismissed as a deft. in this cause by order of the Court, filed 3-15-75, be deleted from the caption and the United States of America dismissed for lack of jurisdiction. (SETH, PAYNE & MECHEM)

Copies of Order sent to counsel. Copies sent to three Judges.

First Amended Judgment, changing the caption. (SETH, PAYNE & MECHEM)

Copies sent to counsel. Copies sent to three Judges.

Copies of Notice of Appeal sent to other counsel, copy of Notice of appeal delivered to the Court Reporter, copy of Notice of Appeal and copy of docket entries sent to Supreme Court of the United States, copy of docket entries and form letter sent to U. S. Attorney for the Secretary of the Interior.

3-27-75 Defendants Response to Motion to Strike.

Copies sent to three Judges.

Transcript of Record on Appeal, original only.

Copy of transcript of record on appeal.

4-14-75 Defendants' Supplemental Notice of Appeal to the Supreme Court of the United States.

Copies of supplemental Notice of appeal sent to other counsel, copy mailed to Clerk, Supreme Court of the United States, and copy delivered to the Court Reporter.

DATE

4-15-75 Affidavit of Joe B. Fallini on behalf of Plaintiff.

Affidavit of William P. Beko on behalf of Plaintiff.

Affidavit of Joe B. Fallini, Jr. on behalf of Plaintiff.

Copies of above affidavits sent to three judges.

4-16-75 Plaintiff's Supplemental Response to Defendants' Motion to Stay.

Affidavit of Pat Archuleta.

Affidavit of Roy G. Gibson.

Affidavit of Lee S. Garner.

Copies of Supplemental Response and above three affidavits sent to three judges.

5-8-75 Letter to three Judges requesting oral argument of counsel with regard to defendants' motion to stay. Filed by attorney for pltfs.

Copies sent to three judges.

Copy of letter from Attorney for Plaintiff to the Solicitor General, Dept. of Justice.

7-3-75 Request for Record and Transcript of proceedings to be transmitted to the Supreme Court, by Plaintiffs-Appellees.

Copy sent to the Supreme Court and to the U. S. Attorney.

7-10-75 Record on appeal in two volumes mailed to U. S. Supreme Court, Washington, D. C., by certified mail.

7-18-75 Copy of letter from Supreme Court of the United States acknowledging receipt of the record on appeal in two volumes on 7-14-75.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 74-127

STATE OF NEW MEXICO, NEW MEXICO STATE LIVESTOCK BOARD, LEE S. GARNER, and CLAUDE FOSTER, PLAINTIFFS

v.

ROGERS C. B. MORTON, Secretary, United States Department of Interior, VICTOR R. ORTEGA, United States Attorney for the District of New Mexico, and THE UNITED STATES OF AMERICA, DEFENDANTS

[Filed March 4, 1974]

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF; TO ORDER CONVENING OF THREE-JUDGE COURT

Plaintiffs, and each of them, hereby and herewith complain for injunction and for declaratory relief as follows:

1. This is a civil action, whereof the United States District Court for the District of New Mexico has original jurisdiction, and is a suit for a declaratory judgment pursuant to the Federal Declaratory Judgment Act of June 14, 1934 (28 U.S.C. 2201), and for injunctive relief, in a case of actual controversy between the Plaintiffs and the Defendants, as more fully hereinafter appears.

2. This action arises under the Constitution of the United States and may be finally adjudicated as between the parties; and the matter in controversy, exclusive of interests and costs, exceeds the sum of $10,000.00; wherefore, this Court is now vested with appropriate jurisdiction and power to declare the rights and legal relations of the parties interested and to grant appropriate equitable relief; and said parties are entitled to such declara-

tion and equitable relief, the same to have the force and effect of a final judgment or decree, and to be reviewable as such.

3. Jurisdiction is conferred upon this Court by Sections 1331, 2282 and 2284 of Title 28, United States Code, in that the Plaintiffs, and each of them, hereby and herewith request the convocation of a three-judge court in order to obtain declaratory relief and interlocutory and permanent injunctions restraining the enforcement, operation or execution of Sections 1331 through 1340 of Title 16, United States Code, and to redress the deprivation under color of Federal Law, of rights, privileges and immunities secured to Plaintiffs and to all persons similarly situated under the Fourth, Fifth, Ninth and Tenth Amendments to the United States Constitution.

4. At all times mentioned herein, the individual Plaintiffs, and each of them, were and now are citizens of the United States and are residents of the State of New Mexico, and within the jurisdiction of the above-entitled Court. The New Mexico State Livestock Board is an agency of the State of New Mexico, created by and operating under the statutes of that state.

5. Defendant Ortego is the duly appointed and acting United States Attorney for the District of New Mexico. In such capacity, he is responsible, inter alia, for the enforcement of the laws of the United States within his jurisdiction and for the prosecution of persons who have committed criminal violations within his jurisdiction. Specifically, he is responsible for the enforcement of Sections 1331 through 1340 of Title 16, United States Code, which Sections are the subject of this action; Defendant Morton is the Secretary of the United States Department of Interior, and as such, is responsible for the operation and execution of the aforementioned United States statutes.

6. On or about the 20th day of January, 1974, Kelley Stephenson, Carrizozo, New Mexico, requested the New Mexico Livestock Board to capture and corral nineteen (19) unbranded and unclaimed burros which had been wandering upon his private property and upon public lands which he was leasing from the Federal Government,

and for which he had obtained federal grazing permits. Said burros were harassing and molesting his cattle, destroying his feed upon both the private land and the grazing permit land, and were otherwise harassing and interfering with Stephenson's ranching operations.

7. Said burros are, and were at all times material hereto, "estrays" within the meaning of the estray law of the State of New Mexico, to-wit: 47-14-1 through 47-14-10, N.M.S.A. (1953 Comp.). The New Mexico State Livestock Board and its director, Lee S. Garner, acting for the State of New Mexico and at the request of Stephenson, impounded said animals and subsequently published notice and sold them at public auction; all pursuant to the estray laws of the State of New Mexico. Plaintiff Foster purchased three of these burros and is presently in possession of them.

8. Notwithstanding the question of illegality of the acts of the Defendants with reference to these specific nineteen (19) burros, other acts, claims and assertions of the Defendants relative to Sections 1331 through 1340 of Title 16, United States Code deprive the Plaintiffs of their aforementioned constitutional rights: To-wit, Defendants' acts concerning jurisdiction and control over unbranded and unclaimed horses and burros, within New Mexico; and Defendants' attempts to restrain the Plaintiffs from implementing the estray laws of the State of New Mexico.

9. The Defendants, through the offices of the United States Attorney Victor Ortega, and the Department of Interior, have asserted and claimed jurisdiction, title, the right to regulate, and the right to possession of said animals, allegedly pursuant to Sections 1331 through 1340 of Title 16, United States Code; and further, the Defendants have demanded that the Plaintiffs cease and desist from further implementing the impoundment and sale procedures authorized by the estray laws of New Mexico. Further, the Defendants demand that said nineteen (19) burros be handed over to the United States, as property of the United States. The plaintiffs state that they intend to continue implementing and acting upon the estray laws of the State of New Mexico, insofar as im-

poundment, ascertaining ownership of and the sale of unclaimed and unbranded horses and burros is concerned, and to do all other acts provided by said estray laws.

10. The burros herein are non-migratory, remaining within the boundaries of the State of New Mexico, and are not involved in, related to, affecting, nor the subject of, interstate commerce. There is no basis upon which the United States may claim or act upon the alleged ownership, jurisdiction over, or regulatory powers concerning said animals; and such acts and claims deprive these Plaintiffs and the citizens of New Mexico of their constitutional rights under the Fourth, Fifth, Ninth and Tenth Amendments to the United States Constitution. These acts also conflict with and violate the estray laws of the State of New Mexico.

11. The State of New Mexico, and the New Mexico State Livestock Board, in its sovereign capacity, and as representative for the citizens of the State of New Mexico, has full regulatory, jurisdictional, and other powers over all non-migratory unbranded and unclaimed horses and burros within its boundaries, where, as in the present action, said animals do not come within the "commerce" powers of the United States, and where, as in this action, said animals are neither destroying nor otherwise molesting federal lands. The acts, claims and assertions of the Defendants herein clearly constitute a violation of the aforementioned constitutional rights and powers of the State of New Mexico, the State Livestock Board, the citizens of New Mexico, and the individual Plaintiffs, and these acts, claims and assertions of the Defendants herein illegally prevent the New Mexico State Livestock Board from performing its legal duties and obligations under the estray laws of the State of New Mexico.

12. Specifically, the Defendants, by their acts, claims and assertions herein, attempt to exercise powers not delegated to the United States by the Constitution of the United States and which powers are reserved to the people and to the states by the Ninth and Tenth Amendments to the Constitution of the United States and, also, Defendants thereby deprive the Plaintiffs and the citizens of the State of New Mexico of property without

due process of law, and confiscate property without just compensation, in violation of the Fourth and Fifth Amendments to the United States Constitution, also, Defendants' acts, claims, and assertions deprive the Plaintiffs of their individual and state's rights under the Constitution of the United States to implement the estray laws of the State of New Mexico.

13. For the reasons stated above, Sections 1331 through 1340 of Title 16, United States Code, are unconstitutional on their face and as applied.

14. Plaintiffs are informed and believe and Defendants have expressly asserted that the Defendants will, unless restrained by this honorable Court, continue to do acts similar to those described hereinabove, with regard to the enforcement and operation of the aforementioned federal statutes, the confiscation of animals, destruction of private property, and deprivation of property without due process of law; and the Plaintiffs have suffered and will suffer irreparable injury unless said acts are restrained by this Court. The Plaintiffs have no adequate remedy at law, for the reason that innumerable actions would have to be brought at this time, and hereafter, upon each such act by Defendants, and, because the damages arising from Defendants' actions, including confiscation of animals, damage to private property, and the attempted annulment of the estray laws of New Mexico, cannot reasonably be ascertained or measured.

WHEREFORE, Plaintiffs pray for the judgment of this Court declaring:

A. That Sections 1331 through 1340 of Title 16, United States Code, are void, unconstitutional and ineffective to prevent the Plaintiffs and others similarly situated from exercising their rights, duties, powers and obligations under the United States Constitution and under the estray laws of the State of New Mexico; and otherwise prevent Plaintiffs from exercising their constitutional rights of ownership, jurisdiction and regulation concerning unbranded and unclaimed horses and burros within the boundaries of the State of New Mexico.

B. That the Court grant a permanent and final injunction restraining and enjoining the Defendants from enforcing, executing or causing the operation of Sections 1331 through 1340 of Title 16, United States Code, and that pending the final determination of this cause, a preliminary injunction issue restraining Defendants from said acts.

PLAINTIFFS COMPLAIN OF DEFENDANTS AS A SECOND AND DISTINCT CAUSE OF ACTION AS FOLLOWS:

15. Plaintiffs incorporate herein paragraphs 1 through 12 and paragraph 14 of the First Cause of Action as though set forth at length herein.

16. The Defendants, by their acts hereinabove described, are executing, operating, enforcing, interpreting and applying Sections 1331 through 1340 of Title 16, United States Code, so as to violate the Fourth, Fifth, Ninth and Tenth Amendments to the United States Constitution, in that Section 1335 of Title 16, United States Code, recognizes the validity and legality of the estray laws of the State of New Mexico and the validity and legality of the acts of the New Mexico State Livestock Board in performing its duties under said estray laws. The New Mexico estray laws and the acts of the New Mexico State Livestock Board do not, therefore, conflict with, contradict, nor interfere with the operation of Sections 1331 through 1340 of Title 16, United States Code.

WHEREFORE, Plaintiffs pray for the judgment of this Court, declaring:

A. That the estray laws of the State of New Mexico, to-wit: 47-14-1 through 47-14-10, N.M.S.A. (1953 Comp.), comply with the Constitution and Statutes of the United States, and specifically, do not conflict with, contradict, nor interfere with the operation, execution or enforcement of Sections 1331 through 1340 of Title 16, United States Code.

B. That Section 1335 of Title 16, United States Code, be interpreted by this Court so as to allow and provide for the continuing operation and validity of the aforementioned estray laws of the State of New Mexico and that, therefore, the aforementioned activities and performance of duties by the New Mexico State Livestock Board, acting for the State of New Mexico under its estray laws, do not constitute a violation of Sections 1331 through 1340 of Title 16, United States Code.

C. That the Court grant a preliminary injunction and final injunction against the Defendants restraining and enjoining said Defendants from confiscating said animals under Sections 1331 through 1340 of Title 16, United States Code, and from otherwise applying the aforesaid Federal Statutes in a manner which would be inconsistent with the operation or execution of the estray laws of the State of New Mexico or in derogation of the rights of the Plaintiffs and the citizens of New Mexico under said state statutes or under the Fourth, Fifth, Ninth and Tenth Amendments to the United States Constitution.

MODRALL SPERLING ROEHL HARRIS & SISK

By _____

Attorneys for plaintiffs
800 Public Service Building
P.O. Box 2168
Albuquerque, New Mexico 87103

[Caption omitted; filed March 11, 1974]

AMENDMENT TO COMPLAINT

Plaintiffs, and each of them, hereby and herewith amend the previously filed Complaint in the above cause for injunctive and declaratory relief, by adding thereto the following:

1. The title of the Complaint is amended to read as follows: "COMPLAINT FOR VIOLATION OF CIVIL RIGHTS; FOR INJUNCTIVE AND DECLARATORY RELIEF; TO ORDER CONVENING OF THREE-JUDGE COURT".

2. Paragraph 3 of the Plaintiffs' Complaint is amended to read as follows: "Jurisdiction is conferred upon this Court by Sections 1331, 1343, 2282 and 2284 of Title 28, United States Code, and by Sections 1983 and 1985 of Title 42, United States Code, in that the Plaintiffs, and each of them, hereby and herewith request the convocation of a three-judge court in order to obtain declaratory relief and interlocutory and permanent injunctions restraining the enforcement, operation or execution of Sections 1331 through 1340 of Title 16, United States Code, and to redress the deprivation under color of Federal Law, of rights, privileges and immunities secured to Plaintiffs and to all persons similarly situated under the Fourth, Fifth, Ninth and Tenth Amendments to the United States Constitution."

3. Paragraph 8 of the Plaintiffs' Complaint is amended to read as follows: "Notwithstanding the question of illegality of the acts of the Defendants with reference to these specific nineteen (19) burros, other acts, claims and assertions of the Defendants relative to Sections 1331 through 1340 of Title 16, United States Code, deprive the Plaintiffs of their aforementioned rights under the Constitution and statutes of the United States. To-wit, Defendants' acts, claims and assertions concerning jurisdiction, control and ownership over all unbranded and unclaimed horses and burros within New Mexico; and, Defendants' attempts and intent to restrain the Plain-

tiffs from implementing the estray laws of the State of New Mexico."

4. Paragraph 10 of the Plaintiffs' Complaint is amended to read as follows: "The burros herein, and all other unbranded and unclaimed horses and burros within New Mexico are non-migratory, remaining within the boundaries of the State of New Mexico, and are not involved in, related to, affecting, nor the subject of, interstate commerce. There is no basis upon which the United States or other Defendants may claim or act upon the alleged ownership, jurisdiction over, or regulatory powers concerning said animals; such acts, claims and assertions deprive these Plaintiffs and the citizens of New Mexico of their rights under the Fourth, Fifth, Ninth and Tenth Amendments to the United States Constitution, and under Sections 1983 and 1985 of Title 42, United States Code. These acts, claims and assertions of the Defendants also conflict with and violate the estray laws of the State of New Mexico."

5. Paragraph 11 of the Plaintiffs' Complaint is amended to read as follows: "The New Mexico State Livestock Board and the State of New Mexico, in its sovereign capacity, and as representative for the citizens of the State of New Mexico, have full regulatory, jurisdictional, and other powers over all non-migratory, unbranded and unclaimed horses and burros within its boundaries, where, said animals do not come within the 'commerce' powers of the United States, and where, said animals are neither destroying nor otherwise molesting federal lands. Therefore, the acts, claims and assertions of the Defendants herein clearly violate the aforementioned rights and powers of the State of New Mexico, the State Livestock Board, the citizens of New Mexico, and the individual Plaintiffs under the aforementioned constitutional and statutory provisions of the United States. Furthermore, these acts, claims and assertions of the Defendants illegally prevent the New Mexico State Livestock Board and the State of New Mexico from performing its legal duties and obligations under the estray laws of the State of New Mexico."

6. Paragraph 12 of the Plaintiffs' Complaint is amended to read as follows: "Specifically, the Defendants, by their acts, claims and assertions herein, attempt to exercise powers not delegated to the United States by the Constitution of the United States and which powers are reserved to the people and to the states by the Ninth and Tenth Amendments to the Constitution of the United States and, also, Defendants deprive the Plaintiffs and the citizens of the State of New Mexico of property without due process of law, and confiscate property without just compensation, in violation of the Fourth and Fifth Amendments to the United States Constitution; also, Defendants' acts, claims and assertions deprive the Plaintiffs of their individual and state rights under the Constitution of the United States to implement the estray laws of the State of New Mexico, and violate Sections 1983 and 1985 of Title 42, United States Code."

7. Paragraph 16 of the Plaintiffs' Complaint is amended to read as follows: "The Defendants, by their acts hereinabove described, are executing, operating, enforcing, interpreting and applying Sections 1331 through 1340 of Title 16, United States Code, so as to violate Sections 1983 and 1985 of Title 42, United States Code, and in violation of the Fourth, Fifth, Ninth and Tenth Amendments to the United States Constitution, in that Section 1335 of Title 16, United States Code, recognizes the validity and legality of the estray laws of the State of New Mexico and the validity and legality of the acts of the New Mexico State Livestock Board in performing its duty under said estray laws. The New Mexico estray laws and the acts of the New Mexico State Livestock Board do not, therefore, conflict with, contradict, nor interfere with the operation of Sections 1331 through 1340 of Title 16, United States Code."

8. Plaintiffs hereby and herewith reallege, restate and incorporate herein all other paragraphs and prayers for

relief in the original Complaint which are not specifically herein amended.

MODRALL SPERLING ROEHL HARRIS
& SISK

By /s/ George J. Hopkins
Attorneys for Plaintiffs
P. O. Box 2168
Albuquerque, New Mexico 87103

[Caption omitted; filed May 20, 1974]

ANSWER

Come now the defendants, Rogers C. B. Morton, Secretary, United States Department of Interior and the United States of America, by their attorneys, Victor R. Ortega, United States Attorney for the District of New Mexico and James B. Grant, Assistant United States Attorney, and for their answer to plaintiffs' Amended Complaint, state and allege as follows:

FIRST DEFENSE

1. The allegations of paragraphs 1, 2, 3, 8, 11, 12, 13 and 16 of plaintiffs' Complaint consist of conclusions of law which require no answer.

2. Defendants admit the allegations contained in the second sentence of paragraph 4 of the complaint but they are without sufficient information, knowledge or belief as to the allegations contained in the first sentence thereof and therefore deny the same.

3. In answer to the allegations contained in paragraph 5 of the Amended Complaint, defendants admit that defendant Rogers C. B. Morton is the Secretary of the Interior and, as Secretary, is responsible for the operation and execution of the Wild Free-Roaming Horse and Burro Act as it applies to public lands under the jurisdiction of the Department of the Interior. In answer to the allegations concerning "Defendant Ortega", Victor R. Ortega, United States Attorney for the District of New Mexico was dismissed as a defendant in this action by Order of this Court dated March 15, 1974.

4. Defendants are without sufficient knowledge, information or belief as to the allegations contained in paragraph 6 of plaintiffs' complaint and the same are therefore denied.

5. The first sentence and a portion of the second sentence of paragraph 7 of plaintiffs' Complaint contain conclusions of law which require no answer. Defendants are without sufficient knowledge, information or belief

as to the allegations of fact contained in said paragraph 7 and the same are therefore denied.

6. Defendants deny they have claimed title to said nineteen burros; that they demand the burros be handed over to the United States as property of the United States; or that they demand that plaintiffs completely cease and desist from further implementing the impoundment and sale procedures authorized by the estray laws of New Mexico, all as alleged in paragraph 9 of the Complaint. The defendants admit they have asserted the right to regulate said animals and the right to their possession for the purpose of returning said animals to the public domain, pursuant to Sections 1331 through 1340 of Title 16, United States Code.

7. Defendants deny the allegations contained in the first sentence of paragraph 10. The remainder of paragraph 10 contains conclusions of law which require no answer.

8. Defendants admit they will continue to enforce the Wild Free-Roaming Horse and Burro Act but deny they have or will continue to confiscate animals or destroy private property as alleged in paragraph 14 of plaintiffs' complaint. The allegation of deprivation of property without due process of law is a conclusion of law requiring no answer.

9. In answer to paragraph 15 of plaintiffs' complaint, defendants assert and re-allege the answer is contained in paragraph 1 through 8 above.

10. Defendants deny each and every allegation of the Complaint not specifically admitted herein.

SECOND DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

The Court is without jurisdiction in this cause and action.

WHEREFORE, defendants pray that this cause and action be dismissed and that defendants recover their costs, and for such other and further relief as the Court deems just and equitable.

VICTOR R. ORTEGA
United States Attorney

By: /s/ James B. Grant
Assistant U.S. Attorney

[Caption omitted; filed October 29, 1974]

MOTION TO DISMISS, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Come now the defendants, Rogers C. B. Morton and the United States of America, by and through their attorneys, Victor R. Ortega, United States Attorney for the District of New Mexico, and James B. Grant, Assistant United States Attorney and move the court for an Order to dismiss or in the alternative for summary judgment for the following reasons:

(1) Plaintiffs have failed to sustain the burden of proving the allegations of their complaint, either through their evidence or their trial brief.

(2) This Court lacks jurisdiction to grant injunctive relief in this cause and action which is based upon a general threat of enforcement of Federal laws and Regulations.

(3) This Court lacks jurisdiction over the subject matter of this cause and action as the basic issue in dispute is the application of the Supremacy Clause, Article 6, Clause 2 of the United States Constitution.

(4) Defendant is entitled to Summary Judgment in that the Act of December 15, 1971, 85 Stat. 649, 16 USC § 1331 *et seq.*, commonly known as the Wild Free-Roaming Horse and Burro Act, is proper Congressional regulatory legislation protecting a part of the public domain as authorized by the Territorial Clause, Article IV, § 3, Clause 2 of the United States Constitution.

(5) Defendant is entitled to Summary Judgment in that the Act of December 15, 1971, 85 Stat. 649, 16 USC #1331, *et seq.*, commonly known as the Wild Free-Roaming Horse and Burro Act, is proper Congressional regulatory legislation under the Interstate Commerce Clause, Article I, § 8, Clause 3, of the United States Constitution.

In support thereof, Defendant invites the Court's attention to the Memorandum Brief attached hereto.

VICTOR R. ORTEGA
United States Attorney

JAMES B. GRANT
Assistant United States Attorney

[Caption omitted; filed November 20, 1974]

MOTION FOR SUMMARY JUDGMENT

The Plaintiffs, State of New Mexico, New Mexico State Livestock Board, Lee S. Garner, and Claude Foster, by their attorneys, Modrall, Sperling, Roehl, Harris & Sisk, move the Court for summary judgment for the reasons stated in Plaintiffs' trial brief previously filed, and in the attached Reply Brief, and on the ground that:

1. The Plaintiffs, by the witnesses and other evidence introduced by Plaintiffs at trial and by Plaintiffs' briefs, have established the allegations of their Complaint and sustained their burden of proof, and have established a prima facie case entitling them to the relief prayed for; and,

2. The Defendants elected not to introduce any evidence at trial, and failed to rebut or impeach the Plaintiffs' prima facie case; and,

3. The Court has jurisdiction over all of the matters and the parties herein.

The Defendants have moved the Court to dismiss this cause, or in the alternative, for summary judgment in their favor, and in support thereof, the Defendants submitted a Memorandum Brief. At the trial of this cause, this Court permitted the Defendants time to file this Memorandum Brief, and granted Plaintiffs time to file a Reply Brief in response thereto. Therefore, the Plaintiffs submit the attached Reply Brief in response to the Defendants' Memorandum Brief and in support of this Motion for Summary Judgment of the Plaintiffs.

The Plaintiffs' position with regard to many of the points raised in the Defendants' Memorandum Brief is set forth by points and authorities discussed in the Plain-

tiffs' brief previously submitted to the Court in this cause, and those points and authorities will not be reconsidered in the attached Reply Brief.

MODRALL SPERLING ROEHL HARRIS & SISK

By /s/ G. Hopkins
Attorneys for Plaintiffs.
P.O. Box 2168
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TRANSCRIPT OF PROCEEDINGS OF
SEPTEMBER 30, 1974

[2] APPEARANCES

FOR THE PLAINTIFFS:

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Attorneys at Law
Public Service Building
Albuquerque, New Mexico
By: MR. GEORGE T. HARRIS, JR.

FOR THE DEFENDANTS:

MR. JAMES B. GRANT
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* * * *

JUDGE SETH: We will hear number 127, State of New Mexico. It is against Rogers Morton.

Are the parties ready?

MR. HARRIS: Plaintiffs are ready, Your Honor.

MR. GRANT: Defendants are ready, Your Honor.

JUDGE SETH: You may proceed.

MR. HARRIS: If the Court please, we have four witnesses, all of whom I think will be fairly brief.

Does Your Honor wish an opening statement from either side?

JUDGE SETH: I don't think it will be necessary.

MR. HARRIS: All right. Our first witness is Mr. Lee Garner. May we call him and have him sworn?

MR. GRANT: Your Honor, before we proceed any further, it was our understanding that there would be no [3] evidence taken in this hearing. We came prepared to make legal argument and legal argument only. We have no idea what these witnesses intend to testify, we have not had a pretrial conference, and we have, therefore, no idea what kind of testimony we should have in rebuttal.

JUDGE PAYNE: That's perhaps my fault. I didn't know about any witnesses, and I told them we were just going to argue about the constitutionality of the statutes. I don't know.

JUDGE SETH: Well, let's get the testimony in, and we will see how it looks at that time. I can't imagine it would be too surprising in its contents.

We will hear the witnesses. Call your first witness.

MR. HARRIS: Mr. Garner, would you come forward and be sworn?

LEE S. GARNER

appeared as a witness in his own behalf, and having been first duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. HARRIS:

Q. Mr. Garner, would you please state your full name and your address?

[4] A. Lee S. Garner, Albuquerque, New Mexico.

Q. What is your occupation, sir?

A. I am the director of the New Mexico Livestock Board.

Q. What is the New Mexico Livestock Board?

A. It's a regulatory agency of livestock and animals' health, theft, and meat inspection for the State of New Mexico.

Q. How long have you been its executive director?

A. Approximately thirteen years.

Q. State very briefly, please, what your duties are as director.

A. My duties are to manage the affairs of the Board, whose duties are to protect the livestock industry from theft and the spread of animal disease, and protect the public from unwholesome meat and meat food products.

Q. Mr. Garner, we are concerned here in this proceeding with a federal statute entitled Sixteen, sections 1331 through 1340 of the US Code, more commonly known as the Federal Wild Horse Act.

Do you have a familiarity with that federal statute, or those statutes?

A. Yes, sir, fairly well.

Q. Have you had, since the effective date of the statute?

[5] A. Yes, sir.

Q. When did it become effective?

A. It became effective in 1971. The final date for claiming animals was 1973.

Q. Section 1332 of that act, in subsection "B," contains a definition of wild free-roaming horses and burros as being all unbranded and unclaimed horses and burros on public lands of the United States.

You are familiar with that definition?

A. Yes, sir.

Q. Can you state from the experience that you have—well, first, perhaps I better ask you what experience you do have in connection with observing the horse population of the State of New Mexico, and particularly the branded and unbranded animals constituting that population.

A. For the past thirteen years, being director of the New Mexico Livestock Board, I have had very numerous occasions to pick up any stray unbranded horses, burros, and other livestock on all lands, both public and private.

Q. And under what authority have you been picking up stray animals?

A. The New Mexico stray law.

Q. State statute?

A. State statute.

Q. Now, during that thirteen years, on what [6] occasion would you have to pick up, or have your people pick up, a stray animal?

A. When the animals were reported to us by someone, some agency or private individual, as having been on their land or their property, the ownership was unknown. Then they would call us in to determine ownership.

Q. During the course of that thirteen-year period and that experience, have you had occasion to estimate or can you now estimate for the Court here, approximately how many unbranded horses and burros there are in the State of New Mexico, total?

A. Under the Act or just total numbers?

Q. Total number in the whole state on all kinds of lands, federal, state, and fee private lands.

A. My estimate of all horses and burros would be close to a hundred thousand. I would say many of these are in the city and they would not be branded, but the wilder animals, or the animals on—range land animals, I would say at least five thousand.

Q. Unbranded?

A. Unbranded.

Q Out on the range and outside the city metropolitan areas?

A. Right.

Q. And what areas of the state are you talking [7] about? The whole state or only particular places?

A. I am talking about the whole state. I think we have some of these all over the state. We have more in the northern part of the state than any other part.

Q. Can you give the Court some idea as to how, prior to the effective date of the Federal Wild Horse Act, the population of these unbranded unclaimed animals was maintained?

MR. GRANT: Objection, Your Honor. This line is totally irrelevant.

JUDGE SETH: Counsel, I don't see quite the purpose of the questioning.

MR. HARRIS: Your Honor—

JUDGE SETH: You have tried to establish a number of unbranded. Now, what is the purpose?

MR. HARRIS: The purpose is to show what will happen unless these animals are controlled and maintained—

JUDGE SETH: Well, you may proceed.

MR. HARRIS: —in some manner.

JUDGE SETH: You may proceed.

Q. (Mr. Harris continuing) How did you control the population prior to 1971?

A. When we had areas where the population of these horses had increased, the agencies or the private individuals where the animals were running would ask for our assistance in disposing of the animals under our New Mexico laws. They would [8] be trapped and maybe pos-

sibly caught by individuals. We would examine them for ownership. If we could find no ownership, then they would be disposed of, they would be sold at public auction, or on a bid basis.

Q. And what would happen to the proceeds of the sale?

A. The proceeds would be held in our office in escrow for two years for an unknown owner.

Q. And then what happens to it?

A. It goes into the funds of the New Mexico Livestock Board.

Q. Now, from whom would you receive these requests to impound and sell at public auction these animals?

A. From private individuals, from the United States Forest Service, the BLM, the Game Department, the various Indian reservations, and the Park Service.

Q. Mr. Garner, absent some form of population control over this approximately five thousand unbranded, unclaimed horses and burros in the state, can you state for us your opinion as to what is likely and probably—probably is going to happen to the population?

A. In my opinion, if there's no control over the population of these horses, no regulations, I would say that the numbers would double within a three-year period, and again would double in the following three-year period, and so [9] on, unless there was some method taken to control the population.

Q. Do you have some estimate for us as to what we are likely, then, to have by the year 1985?

MR. GRANT: Your Honor—

JUDGE SETH: I think that's irrelevant, Counsel. There's a regulation out and a statute on it. I think that's sufficient reasons for the laws.

Q. Mr. Garner, these several herds around the state that you know of that are unbranded and unclaimed, are they migratory in nature?

MR. GRANT: Now, Your Honor, I don't think there's been a proper foundation laid for this witness's qualification to answer that question. I think the question also presupposes a fact not in evidence in referring to these

horses in herds. There's been no testimony that they run in herds.

MR. HARRIS: If the Court please, I think that goes to the credibility of the witness, and—

JUDGE SETH: I don't know as the witness is a biologist—or perhaps he is; if he is, he hasn't told us. There is no basis laid for his knowledge of the habits of these animals, and also no indication that you are talking about the same ones that are covered by the federal act, either. So I will have to sustain the objection to the question.

[10] Q. Mr. Garner, what has been your experience in connection with checking on the various horse herds in the State of New Mexico, both branded and unbranded? For how long have you been doing it?

A. In my official—in my capacity at this time or—

Q. No, before you became the director of the New Mexico Livestock Board, first.

A. Having been born and raised on a ranch, I have had knowledge of these horses, many different herds, and since having this capacity, I have certainly been very close to knowledge of where they are running, and they do run in herds in most cases.

Q. And has it been a part of your duties to keep track of that sort of thing, as director of the Board?

A. Yes, sir, it has been part of my duties.

Q. And how long have you been engaged in those duties?

A. For thirteen years.

Q. Now, can you state for us whether these herds are migratory or not?

A. They are not.

Q. What do you mean by that, sir?

A. I mean they stay in the same general locality. They don't move hundreds of miles, they stay in the general [11] locality. Possibly a range of no more than thirty to forty miles at the most.

Q. Are you familiar, Mr. Garner, with the statute, federal statute we are talking about and the regulations promulgated under that with respect to the claiming of ownership of these unbranded horses before certain dates?

A. Yes, sir.

Q. What, if anything, did you do on behalf of the state in that connection, Mr. Garner?

A. I wrote a letter to the Bureau of Land Management and to the Forest Service claiming all unbranded horses and mules within the boundary of the State of New Mexico, as strays.

MR. HARRIS: May we have this marked, if the Court please?

(THEREUPON, Plaintiff's Exhibit One was marked for identification.)

Q. Mr. Garner, would you please identify for us Plaintiff's Exhibit One?

A. This is a letter from the Bureau of Land Management, December third, acknowledging my claim as of December fourteenth, as to claiming all the burros and horses, unbranded, in New Mexico.

Q. Addressed to whom?

A. To Lee S. Garner, director, New Mexico Livestock [12] Board.

Q. To whom is it addressed?

A. It is addressed to me.

Q. I am sorry, I gave you the wrong one. Identify Exhibit Two for us first, please.

A. Exhibit Two is a letter to Mr. William Hurst, regional director of the southwest region, United States Forest Service, Albuquerque, New Mexico, and this letter was claiming—

MR. GRANT: Objection, Your Honor. The letter speaks for itself.

Q. By whom was it written?

A. It was written by myself.

Q. And to whom is it addressed?

A. To Mr. William Hurst, regional director of United States Forest Service.

Q. For what purpose was it sent?

A. To claim all the unbranded, unclaimed horses and burros within the boundaries of the State of New Mexico.

MR. HARRIS: We move the admittance in evidence of Plaintiff's Exhibit Two.

MR. GRANT: Objection, Your Honor. This letter is addressed to the southwest region of the US Forest Service, Department of Agriculture, and they are not a party to this action. This is the Department of Interior. [13] JUDGE SETH: The letter will be admitted subject to further connection, Counsel.

(THEREUPON, Plaintiff's Exhibit Two was admitted in evidence.)

Q. Please identify for us the Plaintiff's Exhibit Four next, Mr. Garner.

A. It is a letter to Mr. Art Zimmerman, state director of Bureau of Land Management, US Department of Interior, Santa Fe, New Mexico.

Q. Written by whom?

A. By myself.

Q. And for what purpose?

A. Claiming all the unbranded horses and burrors, unbranded, unclaimed horses and burros within the boundaries of the State of New Mexico as strays.

MR. HARRIS: We move the admittance in evidence of Plaintiff's Exhibit Four.

MR. GRANT: May I voir dire the witness for just one question, Your Honor?

JUDGE SETH: Yes.

VOIR DIRE EXAMINATION

BY MR. GRANT:

Q. Mr. Garner, was the purpose of this letter marked Plaintiff's Exhibit Four, to terminate a voluntary [14] agreement which you had theretofore been operating under with the Bureau of Land Management?

A. That was one of the purposes.

MR. GRANT: We have no objection.

JUDGE SETH: It will be admitted.

(THEREUPON, Plaintiff's Exhibit Four was admitted in evidence.)

JUDGE SETH: I believe you have already identified Plaintiff's Exhibit One as being the Bureau of Land Management's response to you dated December 3rd, 1973, to your November 14th, 1973, letter, have you not?

THE WITNESS: Yes.

MR. HARRIS: We move the admittance in evidence of Plaintiff's Exhibit One.

MR. GRANT: No objection.

JUDGE SETH: It will be admitted.

(THEREUPON, Plaintiff's Exhibit One was admitted in evidence.)

DIRECT EXAMINATION (Continued)

BY MR. HARRIS:

Q. Would you next identify for us Plaintiff's Exhibit Three?

A. This is a letter from Mr. William Hurst, regional forester, Albuquerque, acknowledging receipt of my [15] letter of claim of all these animals and in addition, also acknowledging my request to terminate a cooperative agreement as signed.

MR. HARRIS: Move the admittance of Plaintiff's Exhibit Three.

MR. GRANT: No objection.

JUDGE SETH: It will be admitted.

(THEREUPON, Plaintiff's Exhibit Three was admitted in evidence.)

Q. Mr. Garner, are you acquainted with a New Mexico rancher by the name of Kelley Stephenson?

A. Yes, sir.

Q. Have you had occasion to receive a request from him to pick up burros or horses at any time in the past?

A. Yes, sir, through my office.

Q. And when did that occur, sir, if you recall?

A. The last February, early part of February, February fourth.

Q. Of this year?

A. Of 1974, yes, sir.

Q. And from what area of the state is Mr. Stephenson?

A. Over in the neighborhood of Carrizozo, just south of Carrizozo.

Q. As a result of the request he made upon your Board, what, if any, official action did you take, Mr. Garner?

[16] A. I instructed my assistant, Mr. Owensby, to answer the request and proceed to go over and look the situation over, try to identify the animals, and if they were strays to take the necessary action to impound them and dispose of them under our stray law.

Q. And did he do so?

A. Yes, he did.

Q. Was that part of his duties—

A. Yes, it was.

Q. —before the Board?

A. Yes, sir.

Q. Please identify for us what's been marked as Plaintiff's Exhibit Five.

A. This is a report written by Mr. Fred Owensby, assistant director of New Mexico Livestock Board, as to the stray burros on the Stephenson ranch at Carrizozo, New Mexico, explaining in detail what did happen; that they were gathered and they were disposed of.

Q. Now, are those the burros that are the subject of this lawsuit, or part of this lawsuit?

A. Yes, sir.

Q. Is it a part of Mr. Fred Owensby's duties working for your Board to make reports such as the Plaintiff's Exhibit Five?

A. Yes, sir.

[17] Q. And he did so in this case?

A. Yes, sir.

Q. Was that filed with the Board in your office?

A. Yes, sir.

Q. And is that from your file?

A. This is from my files, yes, sir.

MR. HARRIS: We move the admittance of Plaintiff's Exhibit Five, if the Court please.

Your Honor, I am sorry, I have one other question directed to that exhibit. May I ask it?

JUDGE SETH: Yes.

Q. Was that report made at or shortly after the time of Mr. Owensby's investigation?

A. It was made—it was made during and at the termination of his investigation.

MR. HARRIS: Again, Your Honor, we move its admission in evidence.

JUDGE SETH: May I inquire of Counsel, if Mr. Owensby is here to testify? I understood they would be.

MR. HARRIS: He is here and available, if they desire to call him. We had no intent to call him. We don't think it's necessary. We think we have an official record from the state agency involved, which is both a business record and an official document, and, therefore, receivable in evidence.

[18] MR. GRANT: The report contains nothing but hearsay and we object to it on that ground.

JUDGE SETH: It will be admitted. It's part of the official records.

(THEREUPON, Plaintiff's Exhibit Five was admitted in evidence.)

Q. What happened to the burros, Mr. Garner?

A. They were sold at public auction at the Roswell Livestock Auction in Roswell, New Mexico.

Q. In accordance with the State of New Mexico stray laws?

A. Yes, sir.

MR. GRANT: Objection; leading.

THE WITNESS: Sold under the stray laws of the State of New Mexico.

Q. Has anyone from BLM made any demand upon you as the director of the New Mexico Livestock Board for a return of those animals?

A. There has been a demand made to my office that they be—not be sold, and they be returned to the BLM lands.

Q. Who made that demand of you or upon you, and approximately when was it made.

A. It was made approximately shortly after February eleventh, between February eleventh and February eighteenth. It was made—I believe I am correct in saying from the [19] United States Attorney's office.

Q. Here in Albuquerque?

A. Here in Albuquerque.

Q. All right. Now, again, what was the nature of the demand, to do what?

A. Not to sell the animals and to return them to the BLM lands.

Q. Did you receive any instructions or demands from the US Attorney or anyone with BLM about future impoundments and sales of unbranded horses or burros?

A. Yes. We were told that we were not to impound or sell any more on BLM land.

Q. By whom?

A. By the United States Attorney's office.

Q. At the same time of the other demand?

A. Right.

MR. HARRIS: I believe that's all, Your Honors.

CROSS EXAMINATION

BY MR. GRANT:

Q. Mr. Garner, that was me that called your office, is that—

A. Yes, sir.

Q. —is that the conversation you are talking about?

[20] A. Right.

Q. And did you make a note of the date that that telephone call was made?

A. No, I didn't make a note. I don't—I am sure I have it, but I don't have it here.

Q. If I were to tell you that occurred after the sale, the auction in Roswell, would you have any reason to dispute that?

A. I wouldn't—I would have no reason to dispute it, no, sir.

Q. So would you accept the fact that it did occur after the sale?

A. Yes.

Q. So there was no demand then that the burros not be sold?

A. Yes, sir, I am afraid there was.

Q. Would you explain to me how, if the conversation occurred after the sale, that the demand could be made that they not be sold?

A. The demand was made to recover the burros and return them where they belonged. They had already been sold.

Q. So the demand, then, was not to sell them, but to please return them to the public domain, is that correct?

A. Well, this is—

Q. I didn't talk to you?

[21] A. No, you talked to my administrative assistant.

Q. Have you ever entered into a cooperative agreement with the Bureau of Land Management and the Forest Service concerning the handling of strays or those animals which will fit the definition of wild free-roaming horses and burros?

A. Yes, I did.

Q. Do you have a copy of that agreement with you, Mr. Garner?

A. I think I have, sir. I have it in my other file.

Q. I wonder if you would get it for me, please?

MR. GRANT: Excuse me, I think I have located mine.

Q. Have you located it, Mr. Garner?

A. Yes, I have.

Q. Mr. Garner, I hand you what has been marked as Defendant's Exhibit Number A, and ask if you can tell me what that is?

A. This is a cooperative agreement between the New Mexico Livestock Board and the Forest Service and the Bureau of Land Management, August 7th, 1973.

Q. Would you turn to the last page, please? Is that a facsimile of your signature on that?

A. Yes, sir, this is my signature.

Q. And is this a true copy of the agreement?

[22] A. This is a true copy of the agreement.

Q. And what does that agreement purport to do?

A. It purports to agree to work with the BLM and the Forest Service to help manage the wild and free-roaming horses and burros unclaimed on BLM lands and Forest lands.

Q. And did you operate under that agreement?

A. We operated under that agreement for some time.

MR. GRANT: We offer Defendant's Exhibit A into evidence.

MR. HARRIS: We have no objection to it.

JUDGE SETH: It will be admitted.

(THEREUPON, Defendant's Exhibit A was admitted in evidence.)

Q. Mr. Garner, I hand you what's been marked Defendant's Exhibit Number B, and ask you if you can identify that?

A. This—the same letter as I identified, a letter to Mr. Zimmerman, state director of BLM, advising him that New Mexico Livestock Board was claiming all unbranded, unclaimed animals within the boundaries of the State of New Mexico, and serving notice that the cooperative agreement between the two of us would be voided—would be terminated.

Q. In this letter, do you hereby assert ownership and regulatory right over the horses and mules within the state?

A. Yes, sir.

[23] MR. GRANT: I apologize, Your Honor, this letter is already in evidence. I was thinking it was not.

JUDGE SETH: All right.

Q. What studies have you made, Mr. Garner, to determine the numbers of unbranded and unclaimed horses and burros within the State of New Mexico?

A. My studies and reports from my associates and varying agencies under the category as spelled out in the Act, would be approximately five thousand head.

Q. Well, my question was, what studies have you made or caused to be made to determine that five-thousand figure?

A. Well, through reports from my own inspectors, I have asked how many horses of this caliber would be

in their various districts. We have districts all over the state. I have also been in contact with BLM or the Forest Service and other agencies to determine—

Q. Of those five thousand unbranded and unclaimed horses and burros—incidentally, are all five thousand of those unclaimed, even though they may be unbranded?

A. I would say they were unclaimed. I think they are in the same category as we are speaking of that might be running on Forest lands that would be exempt. For instance, Park Service, they have four or five hundred head of burros up there, but they are exempt from this Act.

[24] Q. But the five-thousand figure would include those?

A. That is right. This includes all the animals on all of the lands in the State of New Mexico.

Q. And would that include those on the private land, owned by private individuals, for instance, in the northern part of New Mexico?

A. Yes.

Q. So the figure would be reduced by whatever that figure is to—

A. Yes.

Q. Excuse me.

A. It would include the ones that are on the—on the White Sands Proving Ground, and this is another five hundred.

Q. Would that also include saddle horses within the City of Albuquerque which are unbranded?

A. I am trying to make my estimation animals that would be affected by this, and I would say—

Q. Of that, whatever is left, now, of the five thousand unbranded horses and burros in the state, how many of those run in herds?

A. I would say that the definition of herd is more than one, and I would say that ninety percent of them run in herds.

Q. That would include a mare and her colt?

A. Not necessarily a mare and a colt, but it could. [25] It would be more than one, but I would—I don't think I would define that. I think that a mare and colt

would be one unit. I would say two mares and two colts would be a herd.

Q. And where are most of those located?

A. They are again all over the State of New Mexico. The western and northern part more than any other place, with the exception of the White Sands.

Q. Of that figure, how many are burros and how many are horses?

A. Including that, I would say the last count I had that possibly there could be seven or eight hundred burros and the balance would be horses.

Q. I believe you testified that normally the procedure over the years under the state stray law, that your department would receive a complaint or notification from a private individual of unbranded and unclaimed horses and burros on his private land, and that your department would then pick up that animal, is that correct?

A. That is right.

Q. And that you trapped them?

A. Whatever method that would need to be to impound them, yes, sir.

Q. I believe that was your testimony?

A. Yes, sir, trapping, yes, sir.

Q. And that then they were sold to private [26] individuals?

A. At public auction, most of the time. Otherwise, they would be sold to the highest bidder, written bids.

Q. Oh, by "highest bidder," this would be a sealed bid or a public?

A. Sealed bid.

Q. And these were private individuals buying them?

A. Yes, there were some private individuals buying, yes, sir.

Q. Were there other than private individuals buying them?

A. Well, I am sure at the auction markets there was—you know, I don't think there was other than private individuals. They might be companies.

Q. But companies would buy them?

A. Right, yes, sir.

Q. What sort of companies, Mr. Garner?
A. Ranches, one thing.
Q. Food processors?
A. Food processor is another thing. Horse trader, simply someone who buys and sells horses, I think would be the main purchasers.
Q. Is it your understanding, and is it the policy of your department, that the State of New Mexico exerts ownership of all unbranded and unclaimed horses and burros within [27] the State of New Mexico?
A. We do not exert ownership but for that purpose of the strays. We simply take care of the animals for owners unknown, we dispose of them and the proceeds are held for two years.
Q. Under what authority can you dispose of them if you are not exercising ownership?
A. We are exercising the stray law that gives us the authority to hold them and dispose of them, and hold the proceeds for the owner unknown.
Q. Mr. Garner, I believe Exhibit Four, your letter to Mr. Zimmerman, states that you are exerting ownership on behalf of the State of New Mexico of these wild horses and burros, no matter where they are found.
Now, is it your position that you exercise ownership, or is it not?
A. Well, I suppose—yes, it would be, because we do have the authority to hold them as strays until an owner is found, and we would be the owner until the owner is found.
Q. Do you have an opinion as a director of the New Mexico Livestock Board, as to whether or not you have any duty under either state or federal law to preserve for the public the wild horses and burros unclaimed and unbranded found within the State of New Mexico?
A. Do I have any duties as to preserve the wild [28] horses?
Q. Yes, sir. Do you have a policy, a departmental policy or do you have an opinion as to whether or not you have that duty?
A. Well, to start with I wouldn't call them wild horses, I would call them stray horses, and we do have—

Q. Excuse me, can you answer the question? Do you have a policy concerning the preservation of wild horses and burros within the State of New Mexico within your department?
A. No.
Q. Do you feel that you have a statutory duty, either under state law or federal law, to protect and preserve those wild horses and burros?
A. I certainly think we should help enforce the federal law, yes.
MR. GRANT: Thank you. I have no further questions.
MR. HARRIS: I have two points that were brought up, Your Honor.

REDIRECT EXAMINATION

BY MR. HARRIS:

Q. Mr. Garner, you have testified about a cooperative agreement entered into with the federal government [29] after the effective date of the Federal Wild Horse Act. Can you identify for us Plaintiff's Exhibit Six, which I now hand you?
A. This was a memorandum of understanding with the Forest Service prior to this agreement.
Q. Immediately prior to it?
A. Immediately prior to the passage of the Wild Horse Act.
Q. And how long had it been in effect?
A. It had been in effect—well, since it went into effect the third day of April, 1969. But there was also one prior to that, a couple of years older. But this one was in effect, and—
Q. It was replaced by the cooperative agreement under the Federal Wild Horse Act?
A. This is right.
Q. And as a matter of fact, Plaintiff's Exhibit Six shows on its face that it replaced one dated 1964, I believe?
A. This is right.

Q. Now, did you give a notice of termination of the cooperative agreement entered into under the Wild Horse Act in accordance with termination provisions of the cooperative agreement itself?

A. Yes, sir, I did.

[30] Q. And for what reason did you terminate that cooperative agreement?

A. We weren't pleased with how the agreement was working. We didn't think that it was working the way it was agreed to, to start with, by all parties concerned. We had nothing to do about determining what animal would be called a wild horse and what would not be called a wild horse, and we felt it was not—we weren't being able to carry out our duties.

MR. HARRIS: We move the admittance in evidence of Plaintiff's Exhibit Six.

MR. GRANT: I don't see any objection, Your Honor. It's with the Forest Service, it has nothing to do with this lawsuit.

JUDGE SETH: It will be admitted for whatever it is worth.

(THEREUPON, Plaintiff's Exhibit Six was admitted in evidence.)

Q. And one last point, Mr. Garner: I think there may be some confusion now about the number of unbranded, unclaimed wild horses that in your opinion exist in New Mexico. I am going to try to straighten that out, if you can.

I understand you to say that you think the total population of horses and burros in the state is about a hundred thousand?

[31] A. This is right.

Q. And I don't think you have said, but do you have an idea or an estimate or opinion on it, as to what percentage of that total overall figure is unbranded or—unbranded animals? I am not talking about unclaimed, I am talking about unbranded.

A. I would say at least fifty percent of the horses are not branded.

Q. All right. Now, this category that I asked you about when I first was examining you, was limited to both unbranded and unclaimed animals?

A. This is right.

Q. And your estimate of that figure, as I understand it, is five thousand state-wide?

A. Right.

MR. HARRIS: That's all. Thank you, sir.

RECROSS EXAMINATION

BY MR. GRANT:

Q. Mr. Garner, you have testified that you are familiar with the definition of wild horses and free-roaming horses and burros as contained within that Act, is that true?

A. Yes, sir.

Q. The nineteen burros which are the subject of this lawsuit, do you have an opinion as to whether or not they [32] fit the definition of wild horse and burro, within the meaning of the federal act?

A. They would fit the definition of the federal act.

Q. And, Mr. Garner, since you—the request came to you from the US Attorney's not—to return the nineteen to public domain, did the US Attorney's office receive assurances that no further burros would be picked up and sold at auction from your office?

A. Through my attorney, yes, sir.

Q. And as a matter of fact, has your department subsequently picked up and sold burros at public auction?

A. We have sold two or three, yes, sir.

MR. GRANT: Thank you. I have no further questions.

MR. HARRIS: I have no further questions of this witness.

JUDGE SETH: You may step down.

(THEREUPON, the witness was excused.)

MR. HARRIS: Mr. Stephenson, would you come forward, please, and be sworn?

KELLEY STEPHENSON

was called as a witness by the plaintiff, and having been first duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. HARRIS:

Q. Please give us your full name and address, Mr. Stephenson.
A. Kelley Stephenson, Carrizozo, New Mexico.
Q. What is your occupation, sir?
A. Ranching.
Q. How long have you been in the ranching business in all?
A. I have been on this particular ranch twenty-nine years. I have engaged in the cattle business several years before I moved to Carrizozo.
Q. Do you live on the ranch near Carrizozo?
A. Yes, sir.
Q. Where is your ranch from Carrizozo?
A. Due south of Carrizozo, our ranch headquarters are ten miles due south.
Q. Mr. Stephenson, the complaint that was filed in this case alleges in paragraph six on the third page that on January twentieth of this year, you requested the New Mexico Livestock Board to capture and corral nineteen unbranded and unclaimed burros which had been wandering upon your property on your ranch, is that true, sir? Did you make such a request of them?
A. Yes, but it wasn't in January.
[34] Q. When was it that you made the request?
A. It was in February.
Q. Do you remember when?
A. About the fourth of February.
Q. I hand you what's been marked for identification as Plaintiff's Exhibit Seven. Can you identify that document for us, please, sir?
A. That is a map of our BLM allotment. It's issued to the Stephenson Ranch.

Q. Does that show the area that these burros that are mentioned in that paragraph six, were—
A. Yes, sir.
Q. —roaming at the time of your complaint to the New Mexico Livestock Board?
A. That's correct. That whole area had the donkeys roaming on it.
Q. Now, there's coloring on the map. Can you identify that for the Court, tell us what the different areas are?
A. The yellow is the BLM land, the green is patented land, the blue is state land, and there's some white parcels of land in there that are unclaimed, private ownership land.
Q. Now, that's a Xerox copy, is it not, that we have colored, of the original that you have in your possession?
[35] A. That's correct.
MR. HARRIS: We move admittance of Plaintiff's Exhibit Seven.
MR. GRANT: No objection.
JUDGE SETH: It will be admitted.

(THEREUPON, Plaintiff's Exhibit Seven was admitted in evidence.)

Q. Is there a fence around that entire acreage that is shown on Plaintiff's Exhibit Seven?
A. No, there is not. There are some—there's a mountain range that runs from the north end in a southwesterly direction, and a great deal of that—oh, five miles, six miles—is unfenced. It's just a high mountain range.
Q. Natural barrier?
A. A natural barrier.
Q. How about your north boundary?
A. That is fenced.
Q. And the boundary on the west?
A. That is fenced, that's along the railroad right-of-way.
Q. Where is the state highway that runs south out of Carrizozo with reference to the map you have?
A. Well, it parallels this land as much as a half- to a quarter-of-a-mile to the west.

Q. It's on west of the railroad?
[36] A. On west of the railroad. The railroad parallels the fence.
Q. Now, on your south boundary, you have a fence down there?
A. Yes, sir.
Q. And who bounds you on the south, Mr. Stephenson?
A. The Three Rivers Ranch that had been owned by Mr. Tom Ryan for several years.
Q. Is it now?
A. No. He has sold it to Leavell, Charles Leavell Company in El Paso.
Q. And they are running it now?
A. I will say he has sold it, it's under contract.
Q. I notice at the extreme end of that fence separating your land from Leavell's, there is the same sign, that of a mountain range, that is shown up at the extreme north end. Is that fenced or unfenced?
A. Well, his fence line isn't shown on there because the land to the east of that irregular line is about three thousand acres in there of our patented land that runs north and south against that irregular line.
Q. I guess my question wasn't put well. Do I understand, then, that horses or cattle or burros can roam anywhere on that entire acreage that's colored in on Plaintiff's Exhibit Seven?
[37] A. On all of that, and on the acreage to the east of it.
Q. Including the state land and your own private fee land?
A. Yes, and—
Q. And BLM land?
A. And Mr. Ryan's original ranch.
Q. Now, the BLM land, you have shown in yellow, have you not?
A. That's right.
Q. Do I understand you to say you have that BLM permit to run cattle on that?
A. That's correct.
Q. What sort of an allotment do you have in that respect?

A. We have a two-hundred-head permit for six months.
Q. That's part of your overall ranch operation?
A. Yes.
Q. What sort of cattle operation do you run down there, Mr. Stephenson?
MR. GRANT: Your Honor, this is really getting irrelevant now. Object to this line.
JUDGE SETH: I think the complaint indicates that they interfered with the cow and calf operation. You may [38] answer the question.
Q. What sort of operation do you conduct?
A. Cow and calf in that area.
Q. How long have you had this allotment from BLM to run two hundred head of cows on that government land?
A. Since about 1960, but I have managed this allotment since 1945. I originally had charge of this ranch for Harold Brothers and moved there in 1945, and now I have had direct charge of it since 1945.
Q. Does the map indicate on it by any reference at all where the burros were when they were picked up by the New Mexico Livestock Board?
A. Yes, it would be section thirty.
Q. And is there a color there, or a circle or anything that will identify that for the Judges?
A. It has a circle and a red mark on it.
Q. What does that indicate, Mr. Stephenson?
A. We know that as the Taylor Well. And that's a joint watering between the Ryan Ranch and our ranch.
Q. Mr. Stephenson, when did you first learn—when and how did you first learn about these particular burros being on your ranch?
A. Well, could I expand on that just a little bit?
Q. Yes, sir.
A. We have had a few burros down in that area, I [39] know, to my knowledge, for the last twenty-nine years.
Q. In that area, you are talking about the government land or are you talking about fee land, or what are you talking about?

A. Well, mostly on your fee land, because they run —that is the best land and that's where the burros run, up in the mountains.

Q. That's toward the east, then, of the BLM land?

A. That's correct.

Q. And by "a few," can you give us an idea how many, of your knowledge, have been down there for several years?

A. Eight to ten would be the most that we would ever tally.

Q. All right. Have you had any trouble—how many years did you say that they have been down there?

A. Well, I have been there twenty-nine years and there's been a few donkeys there for the last twenty-nine years.

Q. Has there been any trouble at all on your ranching operation with respect to maintaining the herd at that level?

MR. GRANT: To which we object as being irrelevant to the issue in this lawsuit.

JUDGE SETH: I think it's irrelevant, Counselor. We are talking about these particular burros that were impounded.

[40] Q. Now, you were about to tell us how you first found out about these particular burros and when you did so. Please do that.

A. Well, it was February first and I learned about this large number of donkeys, and I called by the BLM office to talk to them about another matter, and—

Q. Which office and with whom did you speak in BLM?

A. Well, Mr. Charles Hodgins, who is the assistant manager of that office.

Q. Where?

A. At Las Cruces. And in this conversation was Mr. Barker, who is in charge of that district, and one of their assistants sat in on the conversation, too. I can't tell you his name. He's been replaced by—he was replacing Jack Allbright who had charge of our area.

But in the course of the conversation, Mr. Hodgins said, "Well, Kelley, we have just come from up at your ranch"—

MR. GRANT: Objection; hearsay.

MR. HARRIS: If the Court please, it's not hearsay. First, it is a statement from the defendant itself by its own agents, and second, we are not offering it for proving the truth of the statement but only that the statement was made.

[41] JUDGE SETH: Overruled.

Q. Go ahead, please, sir.

A. He said, "We were up at your ranch a day or two ago and," he says, "there was quite a bunch of donkeys at the Taylor Well." And he says, "Here's a picture of them," and he pulled the picture and showed it to me.

And he said, "We counted twenty-five donkeys there." And I told him, I said, "Well, Charles, I have never seen a donkey at Taylor Well. We have always had a few donkeys, but they were up in the mountains."

He said, "Well, there's a picture of them." And we had a general conversation about them, of course, and the climax of the conversation was, I asked him, I said, "Well, Charles, what happens when you have a band of donkeys in this amount and they don't get along with the cows?"

And he says, "Well, if the donkeys—or if the cows interfere with the donkeys, the cows has got to go."

Q. Did you check out the existence of that size donkey herd then, after that?

A. Now, that was on Friday. On Saturday I went to the Taylor Well, and this band of donkeys was there. I counted twenty-four that time.

Q. And tell us exactly what you did observe in addition to the twenty-four donkeys.

A. Well, the donkeys were all on the feed ground, [42] and there was some cows down there, there was a limited number of cows around the perimeter of this feed ground, but the donkeys had run the cows away.

Q. How many cows were you feeding down in the Taylor Well area?

A. At that time there was between forty and fifty.

Q. And what kind of feed were you giving them?

A. Protein blocks.

Q. And what did you observe with respect to the donkeys and the food that you had put out for the cattle?

A. Well, they were eating the protein blocks.

Q. Did you continue to check on them afterwards?

A. Almost daily. We were there the next day, and the fact of the matter of the business is, my son Bill took some pictures of them on Sunday.

Q. What did you observe during that entire week following your first observation on that Sunday?

A. Well, when we would go down there with a load of feed, those donkeys would come right on in to the feed ground and take charge of it, and stay there until they eat up those blocks.

Q. What can you say with respect to their apparent wildness during your observation?

A. Well, in my opinion, they were not wild, because you could walk around them, you could take pictures of them, [43] you could—it was pretty hard to disturb them. I don't think you could run them off unless you done it on a horse.

Q. All right. What, if anything, did you do, or have you done, about getting rid of them?

A. Well, when I heard about the donkeys from Mr. Hodgins, when I returned to the ranch I talked to my son, Bill, and he says, "Well, I believe that the Sanitary Board could take care of those for us."

Q. Did you people call the Livestock Board?

A. He did. I didn't. He called Mr. Owensby.

Q. That's Mr. Fred Owensby?

A. Mr. Fred Owensby.

Q. Did he come down?

A. Yes, he come down.

Q. When was that, if you recall?

A. We called him on the fourth and he said that he would organize his group and come down and get the donkeys, and I believe it was the following Monday, which would have been probably, I think, the eleventh.

Q. And did they gather and remove the donkeys?

A. He come down there and took charge of the donkeys, and I wasn't on hand so I can't testify as to what took place there.

I just know that they gathered the donkeys and took them away.

[44] Q. From your long experience in the ranching business have you had occasion to observe the compatibility of burros and cattle running together and being fed together?

A. Any time you have a herd of donkeys intermingled with jacks, of course, you can't run cows and baby calves.

Q. Why can't you?

A. They kill them.

Q. Mr. Stephenson, on the day you went down on Sunday and first saw the twenty-four donkeys, did you observe any evidence of any damage to any of your fences or your gates?

MR. GRANT: Your Honor, I object to this line of questioning as being irrelevant.

JUDGE SETH: He can testify as to the physical situation there.

Q. Go ahead, sir.

A. I had had a report from my son and the cowboy that works for us about the situation that they had found when we moved the cows down there the first of December, and he could testify to that. Or I can tell you, if you would like for me to, what they found.

Q. Well, let me first start with when did you put out the supplement blocks, the cake, that you saw the burros eating when you went down there on Sunday?

A. We just had started feeding.

Q. You mean by that—

[45] A. Maybe a week before, something like that.

Q. Were you gates up down there on the south boundary at that time?

A. Were the what?

Q. The gates, were they up and in good repair?

A. They were at that time.

Q. Had they been damaged previously?
A. Well, they had been. Someone had evidently been into our corrals and taken a big two-by-six gate, unscrewed it, and took it off the hinges and laid it down like they had unloaded something, and run it out into our pasture.
Q. When did you first observe that situation there at the Taylor Well?
A. When we moved the cows down there. And Bill could testify to that because he was present then, I wasn't
Q. How far is that Taylor Well east of the Carrizozo highway?
A. A little over a mile, about a mile-and-a-half.
MR. HARRIS: Thank you, Mr. Stephenson.

CROSS EXAMINATION

BY MR. GRANT:

Q. Just to clear up the record, Mr. Stephenson, I believe you testified that when Mr. Harris was reading to you [46] the complaint—incidentally, have you ever seen the complaint filed by the State of Kansas before —or State of New Mexico before?
A. No, I don't think I have seen that.
Q. I believe he read to you out of paragraph six saying that these burros were on your property, and later on I believe you testified that the burros were down around Taylor Well, shown in yellow on this?
A. At this particular time they were in BLM land on the Taylor Well.
Q. That's not your property there?
A. No, that's government property.
Q. That's federal property, yes. When Mr. Hodgins came out and talked to you—did he come out to your place to talk to you, or did you go in and talk to him?
A. Well, he and Bill had the conversations.
Q. Oh, you didn't have a conversation with Mr.—
A. No, Bill had the conversation with him.

Q. So what you were talking about was what somebody else told you that he said?
A. That was hearsay.
Q. And the picture you were talking about, you never saw?
A. This picture?
Q. That Mr. Hodgins took, you were talking about [47] him having a picture?
A. Oh, no, we took the pictures. I saw the pictures.
Q. Mr. Hodgins didn't take a picture or show you a picture?
A. I don't know about his pictures, but Bill took some pictures and sent some of them to Mr. Owensby.
JUDGE SETH: I think you are confusing the meeting at Las Cruces with the conversation with Mr. Owensby.
MR. GRANT: That could very well be.
THE WITNESS: And I mentioned pictures, too, that Mr. Hodgins had in his possession, taken by the BLM agents.
Q. All right. Did you see those pictures?
A. I saw them.
Q. Okay. Would you recognize those pictures again if you saw them?
A. Oh, I think I would.
Q. Are those the pictures that you saw, or either one of them?
A. Well, he had several pictures there and, of course, our pictures were also taken in this same area, but I would say that those were the pictures that Mr. Hodgins showed me.
MR. GRANT: All right, sir.
We intend to—well, I started to say, [48] Your Honor, that we intended to have a witness properly identify these pictures and have them introduced at that time, but—
MR. HARRIS: We have no objection to their receipt in evidence. I think the witness has already identified them.

JUDGE SETH: You can introduce them through Mr. Stephenson.

Q. Mr. Stephenson, I showed you the pictures that have been marked as Defendant's Exhibit C, and ask you to look at the uppermost picture of those two. Can you see the burros in that picture?

A. Yes.

Q. Can you see the cattle in that picture?

A. Yes.

Q. Is that a picture of Taylor Well?

A. Yes.

Q. And where are the burros in relation to the cattle and the Well?

A. Well the cows—the burros in this particular picture are on the perimeter of the feed ground, and the cows would be directly on the feed ground.

Q. Wouldn't appear, then, that the burros have run the cattle off, would it?

A. Well, you can't tell. You can't tell.

[49] MR. GRANT: We offer Exhibit C.

MR. HARRIS: We have no objection.

JUDGE SETH: Be admitted.

(THEREUPON, Defendant's Exhibit C was admitted in evidence.)

Q. Did Mr. Hodgins ever explain to you the Wild, Free-Roaming Horse and Burro Act?

A. No, he didn't. When I got home, I had a copy of it and read it.

Q. Did you read it?

A. Yes, sir.

Q. Was this prior to calling the State Livestock Board about the burros at the Taylor Well?

A. Well, during that time. I can't say whether it was before, because I was curious because from the statement that Mr. Hodgins made to me. I just couldn't understant an act that would say that burros had the dominance over things, you know, over the range.

Q. Is this what you meant when you say that Mr. Hodgins said that the cows had to give way to the burros?

A. He said the cows have got to go, that's his exact statement.

Q. He was talking in relation to the Wild Horse and Burro Act?

A. Yes.

[50] Q. The burros on this ranching operation ranged generally in the Godfrey Hills, do they not?

A. That's correct.

Q. And the Godfrey Hills are primarily on BLM land, are they not?

A. Well, our Godfrey Hills are primarily all patented. Now, there's some Godfrey Hills south of our ranch in the Ryan Ranch, that I really don't know the exact status of.

Q. When you saw this—I am a little confused about the gating being down. Are you trying to say, Mr. Stephenson, that someone may have put these burros on your ranching operation?

A. I can very easily imagine that. I never had a concentration like that. We never had any burros at Taylor Well.

Q. Is Taylor Well your well? Do you own the water rights?

A. Well, it's a joint watering. We put the improvements there, Mr. Ryan—and that's when he had the ranch—and our ranch, and we maintain them. We have dug a new well there. We built the corrals there about four years ago, have a nice set of corrals there, and we work our cattle.

Q. You make use of the well?

A. We make use of the well and the corrals, too.

Q. But you don't own the water rights from the well, [51] do you, Mr. Stephenson?

A. Only by what rights we have by using BLM land, you know? You list those improvements when you take a BLM permit. We have the well listed as part of our improvements and the corrals listed as part of our improvements.

Q. Is the Taylor Well, if you know, public water reserve?

A. I can't answer that.

MR. GRANT: Thank you. I have no further questions.

REDIRECT EXAMINATION

BY MR. HARRIS:

Q: Mr. Stephenson, can you identify for us, please, the photographs now marked as Plaintiff's Exhibits Eight through Eleven, inclusive?

A. Well, like I said, Bill took some of them pictures and I think that Mr. Owensby took some of those pictures.

Q. My question of you is do you recognize them as photographs of your cattle at the well?

A. I recognize the location and I know I have seen these two pictures, and I am not right sure about—

Q. You are talking about Plaintiff's Ten and Eleven?

A. I think that's the pictures that Bill took.

[52] Q. And do you recognize that as the Taylor Well area?

A. Oh, that is, that is definitely.

MR. HARRIS: We move the admittance in evidence of Plaintiff's Exhibits Ten and Eleven.

MR. GRANT: No objection.

JUDGE SETH: They will be admitted.

(THEREUPON, Plaintiff's Exhibit Ten and Eleven were admitted in evidence.)

MR. HARRIS: That's all. Thank you, sir.

JUDGE SETH: Anything further of this witness?

MR. GRANT: Nothing further.

JUDGE SETH: You may be excused.

(THEREUPON, the witnes was excused.)

MR. HARRIS: Mr. Pankey, would you come forward, please?

RUBEN E. PANKEY

was called as a witness by the plaintiff, and having been first duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. HARRIS:

Q. State your name, please, and your address.

A. Ruben E. Pankey, Truth or Consequences, [53] New Mexico.

Q. What is your occupation?

A. Rancher.

Q. How long have you been a rancher in New Mexico?

A. Lifetime.

Q. What is your age?

A. Fifty-six.

Q. Are you presently active and have you been for some time in the past, in either the state or the national Cattlemen's Association?

A. Yes. I—I am presently very active in that area, a lifetime in New Mexico Cattle Growers, and many years with the American National Cattlemen.

Q. What, if any, titles or offices have you held in any or both of those associations?

A. Presently I am a mmeber of public lands committee of the American National Cattlemen, immediate past chairman of the forest committee of the American National Cattlemen, and a member of the legislative committee of the same organization, and vice-chairman of the public lands committee, New Mexico Cattle Growers.

Q. Is there such a thing as Public Lands Council?

A. Oh, yes. We have an organization of sixteen western states called the Public Lands Council, which is comprised of the grazers of the public domain in these sixteen [54] western states, both Forest and Bureau of Land Management lands.

Q. Do you have any connection with the Council?

A. Yes, I am an ex officio member representing the American National Cattlemen.

Q. How long have you been?

A. Since we organized this organization in 1969.

Q. Does that organization work closely with both the BLM people and the Forest Service people?

A. Very, very closely. That's our main concern of our organization, the reason we were organized is to

protect our rights and privileges that we enjoy under the grazing cattle on public domain.

Q. Do you have a knowledge, Mr. Pankey, of the Federal Wild Horse Act?

A. I have a working knowledge of it. I am not too well versed by letter and word of the entire Act, but I do know what it means and what it does.

Q. Is that a subject of some concern with your national organization?

A. It's a subject of very grave concern. We have just had a meeting in Denver, and our main agenda, or one topic, was the unmanageable situation.

MR. GRANT: Well, now, Your Honor, I am going to object to this line to testimony.

[55] JUDGE SETH: Well, I think the characterization is perhaps a little bit extreme, but he can testify that subject was discussed.

THE WITNESS: We discussed the administration and impossibility of living under the Wild Horse and Burro Act.

Q. What is the problem that your organization or association sees in the particular area, Mr. Pankey?

JUDGE SETH: Counsel, I don't believe that's relevant to discuss in our litigation here.

MR. HARRIS: If the Court please, may we make a tender of proof on it for the record?

JUDGE SETH: Yes—

MR. HARRIS: We will be brief.

JUDGE SETH: —you may.

TENDER OF PROOF

BY MR. HARRIS:

Q. Now, do you recall my last question?

A. What was our main concern?

Q. Yes, sir.

A. Is the ownership of the animals, and inability of the governmental agencies to deliver title, and the control of numbers which will destroy our ranches.

Q. New, tell us what you mean by the control of numbers, please.

[56] A. Well, as has been previously testified, and I concur, that the numbers will double in three to four years and double in the same period thereafter. There's no absolute allocation of BLM for these animals, someone has to give. And we can see a terrible conflict there in the use of the forage which is needed for national needs.

Q. Well, as a matter of fact, are you familiar with regulation four seven one two point one dash four, promulgated by the Bureau of Land Management, on that very subject as to closing public lands to grazing?

A. I am just only reasonably familiar with this, but we had been worried by what was in the main Act, for the lack of absolute definition where these horses were to be accommodated.

Q. Have you had occasion recently to look at that promulgated regulation about enclosure?

A. Yes, I have, and it seems to be in conflict, to me, as to what the Act itself says.

Q. In what respect, please?

MR. GRANT: May I inquire, is this still part of your tender?

MR. HARRIS: It's part of the tender, yes.

THE WITNESS: Well, the Act seems to have a limiting effect as far as I can tell, and this has a very broad effect of where there will be no end to the amount of [57] wild horses allowed.

Q. Do you have some knowledge yourself, Mr. Pankey, as a rancher of long standing in New Mexico, about the rapidity at which these unclaimed, unbranded herds of horses or burros multiply in New Mexico?

A. Yes. From a lifetime of grazing horses, and from the removal of the wild horses in the southern part of the state when I was from about fifteen years on, the—New Mexico has a very fine climate, type of forage, mild climate, and the horses here multiply very rapidly. It's disease-free, and that's why there were in such great numbers to start with, the reason for the passage of the Taylor Grazing Act.

Q. What period are you talking about?

JUDGE SETH: Counsel, I think you are abusing your privilege of the offer of proof. We will consider that the completion of the offer.

MR. HARRIS: That's all the questions we have, if the Court please.

JUDGE SETH: It is excluded.

MR. GRANT: No questions.

JUDGE SETH: You may be excused.

(THEREUPON, the witness was excused.)

JUDGE SETH: Do you have any other witnesses?

MR. HARRIS: That concludes the plaintiff's [58] proof, Your Honor.

JUDGE SETH: Plaintiff rests.

We have a proof problem, obviously, counsel. Do you wish to reopen the case?

MR. GRANT: Your Honor, I think possibly a motion to dismiss is in order at the present time.

JUDGE SETH: Well, let's first decide, do you wish to offer any additional proof? We will have to decide that first.

By way of witnesses or any exhibits, anything of that nature?

MR. GRANT: May I have a moment to confer?

JUDGE SETH: Yes.

MR. GRANT: I think, Your Honor, that the defendant at this time declines to offer to produce testimony.

JUDGE SETH: You will rest at this point, is that correct?

MR. GRANT: Yes, sir.

JUDGE SETH: You may make your motion if you wish to do so.

MR. HARRIS: If Your Honor please, before he does, I am sorry, I inadvertently failed to call as an adverse witness, Mr. Harlan Smith, whom we subpoenaed here to testify on one point only, and by him I intend to put in one document, and I would like to do—

[59] JUDGE SETH: You may reopen your case.

Is Mr. Smith here?

HARLAN SMITH

was called as an adverse witness by the plaintiff, and having been first duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. HARRIS:

Q. What is your full name?

A. Harlan Smith.

Q. What is your address and your occupation or profession?

A. Santa Fe. I am chief, branch of protection for the Bureau of Land Management.

Q. Can you identify for me, please, what's marked as the Plaintiff's Exhibit Twelve, Mr. Smith?

A. This is a news release issued by Doyle Cline, September 21st, 1973, referring to wild horses and burros in New Mexico.

Q. Out of your Santa Fe office of BLM?

A. Yes, sir. It says from Santa Fe.

Q. That, then, is an official publication of the BLM out of the Santa Fe office?

[60] A. Yes.

MR. HARRIS: We move the admittance in evidence of Plaintiff's Exhibit Twelve.

MR. GRANT: May I inquire of the witness, was this ever published, this news release?

THE WITNESS: I don't know.

MR. GRANT: We object, Your Honor, to the admission of Plaintiff's Exhibit Twelve.

JUDGE SETH: Do you have anything to say about its publication or nonpublication?

MR. HARRIS: If the Court please, it is an official record according to what the witness just testified to, of the BLM office in Santa Fe, and, therefore, admissible under the Official Documents Rule.

JUDGE SETH: It will be admitted.

(THEREUPON, Plaintiff's Exhibit Twelve was admitted in evidence.)

MR. HARRIS: That's all the questions we have, Your Honor.

MR. GRANT: No questions.

(THEREUPON, the witness was excused.)

JUDGE SETH: Both sides have rested, then, is that correct?

MR. HARRIS: Yes, sir.

JUDGE SETH: As far as legal arguments are [61] concerned, I think that the Court would prefer it if you would submit memoranda or briefs on the subject, instead of arguing the case orally.

MR. HARRIS: We have three here, Your Honor, for that purpose, if we may present them now.

JUDGE SETH: Yes, give them to the clerk.

And do you wish to renew your motion to dismiss, Counsel?

MR. GRANT: Yes, Your Honor, and not for the purpose of legal argument, but merely to bring the Court's attention—like in the first place, plaintiff's have failed to sustain so far the burden of the allegations contained in their complaint. They have failed to establish a case or controversy, and I would merely like to bring the Court's attention to a recent Ninth Circuit decision not yet published, but it's case number seventy-one dash one nine two seven, the *Rincon Band of Mission Indians* v. *the County of San Diego*, and others, where the Court found that the general threat of enforcement of a statute is insufficient to create a controversy or case.

And the injunctive relief sought here is insufficient to form a case or controversy under that—any general threat of a statutory enforcement.

I think, Your Honor, and also not to get into the brief on—that's to be filed, but I think this bears [62] bringing to the Court's attention at this time, too, and we move to dismiss on jurisdictional grounds at this time for the reason that this case, the plaintiffs have failed to prove or show either in their pleadings or in their evidence that they are entitled to a three judge court.

This case should have been assigned to a single judge district court, and we merely bring the Court's attention to the recent United States Supreme Court decision of

Swift and Company v. *Wickham*, found in 382 U.S. 11, where the Court reaffirmed the old rule that a case brought merely under the supremacy clause is not sufficient constitutional question to justify a three judge court, and dismissed the action on the grounds of jurisdiction.

And it's the same situation we have here. There's been no showing other than a bare statement of constitutional encroachments that anything other than the supremacy clause is involved, and for that reason we feel that this court is without jurisdiction to hear this matter.

JUDGE SETH: Would you have any objection in the event the Court agrees with you on that point, to disposition of the case by Judge Payne as a single judge?

MR. GRANT: Have no objection.

JUDGE SETH: On the basis of the proof that we have heard—

MR. GRANT: We would ask this, Your Honor, [63] that if a decision is to be made, that it be made promptly. Seven of the little animals have died in captivity, and we would like to have this case over as soon as possible.

JUDGE SETH: Very well.

Do you want to respond to the motion?

MR. HARRIS: No, Your Honor. I do not care to. I would like the opportunity of filing a reply brief if they are going to file an answer brief, since we have the right to open and close, any arguments.

JUDGE SETH: How about the time? Do you have a brief prepared, Counselor?

MR. GRANT: No, Your Honor, we do not. We planned to present oral argument.

JUDGE SETH: Yes, I understand that. How long a period of time, say twenty days? Would that be sufficient?

MR. GRANT: I think twenty days would be sufficient, yes, sir.

JUDGE SETH: And you may respond in five days after that.

MR. HARRIS: Thank you, sir.

JUDGE SETH: The case is submitted, then, on that basis, and the court will be in recess.

(THEREUPON, court stood in recess.)

[PLAINTIFFS' EXHIBIT 1]

UNITED STATES
DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT
State Office
P. O. Box 1449
Santa Fe, New Mexico 87501

December 3, 1973

Mr. Lee S. Garner
Director
New Mexico Livestock Board
P. O. Box 2048
Albuquerque, NM 87103

Dear Mr. Garner:

We acknowledge receipt of your letter of November 14, 1973, in which the New Mexico Livestock Board on behalf of the state asserts ownership and regulatory rights over any horse, mule or ass found running at large upon public or private lands in New Mexico.

Your letter has been forwarded to our Field Solicitor and to our Washington Office for their response. Once they have fully reviewed your letter, we will advise you of how your claim will be processed. It is my responsibility to advise you that we fully intend to enforce Public Law 92-195 and the Department of the Interior, Bureau of Land Management regulations 43 CFR 4700 as they pertain to the protection, management and control of wild horses and burros on the national resource lands. As requested, the "Cooperative Agreement" of August 7, 1973, between the New Mexico Livestock Board, the U. S. Forest Service through the Regional Forester of Region 3, and the Bureau of Land Management through the State Director will be considered terminated as of January 14, 1974. We assume that you will continue to honor the agreement until the 60-day period has lapsed

and take no contrary actions during this period. Hopefully we will be able to advise you as to how your claim will be processed by that time.

Sincerely yours,

/s/ Keith E. Norris
Acting State Director

[PLAINTIFFS' EXHIBIT 2]

November 14, 1973

Mr. William Hurst, Regional Director
Southwest Region of the U. S. Forest Service
U. S. Department of Agriculture
514 Gold, SW
Albuquerque, New Mexico 87103

Dear Mr. Hurst:

This is to advise you that the New Mexico Livestock Board, on behalf of the State of New Mexico, hereby asserts ownership and regulatory rights over any horse, mule or ass found running at large upon public or private lands, in New Mexico, whose owner is unknown, whether branded or unbranded, or which animal is branded with a brand which is not on record in the office of the New Mexico Livestock Board, as per the definition of "estray" animals, 47-14-1 N.M.S.A. (1953 Comp.)

Implementation of the New Mexico Estray Law, Chapter 47, Article 14, N.M.S.A., is provided for the "Wild Horse Act", at Title 16, Sec. 1335, U.S.C.A. The New Mexico Livestock Board, pursuant to this section of the Federal "Wild Horse Act", and pursuant to the estray laws of New Mexico, hereby serves notice that it intends to exercise its powers under these statutes to regulate, impound, or take up such estray horses, mules or asses, as defined above. Also, pursuant to 47-14-5 and 47-14-6, N.M.S.A. (1953 Comp.) and Title 16, Sec. 1335, U.S. C.A., the New Mexico Livestock Board intends to exercise its right to sell said impounded estray animals to private individuals, if said estray animals shall not be claimed after publication and posting of notice as required by Chapter 47, Article 14, N.M.S.A.

The New Mexico Livestock Board hereby serves notice that it is terminating the "Cooperative Agreement" of August 7, 1973, between the New Mexico Livestock Board, the U. S. Department of Agriculture (by the

U. S. Forest Service) and the U. S. Department of the Interior (by the Bureau of Land Management), as per Sec. C, Paragraph 3, of the agreement which provided that it ". . . can be terminated by any party upon 60 days written notice to the others." This letter shall constitute the written notice by which said agreement shall be terminated in 60 days.

To the extent that the Chapter 47, Article 14, N.M.S.A. definition of "estray" conflicts with the Federal "Wild Horse Act" definition of "wild free-roaming horses and burros", the New Mexico Livestock Board hereby serves notice that it intends to exercise all regulatory, impoundment and sale powers which it derives from the New Mexico Estray Law, over all estray horses, mules or asses found running at large upon public or private lands within New Mexico, as defined in the New Mexico Statutes above. This includes the right to go upon Federal or State lands to take possession of said horses or burros, should the Livestock Board so desire.

As an additional basis of the authority of the State of New Mexico, through the New Mexico Livestock Board, to assert jurisdiction, ownership and regulatory powers over these estrays, it is hereby asserted that all non-migratory animals within the boundaries of the State of New Mexico belong to the people of the State, whether said animals are on Federal or State lands, and that the ownership of said wild animals, so far as they are capable of ownership, is in the State of New Mexico, in its sovereign capacity, as a representative, and for the benefit of all its people. The State of New Mexico has the right to control and regulate the common property in these wild animals within its boundaries. Since these horses or burros are not the subject of interstate commerce, and are non-migratory, and since the Federal government is not asserting that said animals are damaging Federal lands (whereby, arguably, the Federal

government may have the right to destroy said animals), the Federal government has no right to control, regulate or assert ownership of these animals.

Sincerely yours,

LEE S. GARNER, Director
New Mexico Livestock Board

LSG/lls

cc: Gerry Hopkins, Attorney
Modrall, Sperling, Roehl, Harris & Sisk

[PLAINTIFFS' EXHIBIT 3]

UNITED STATES DEPARTMENT OF AGRICULTURE

FOREST SERVICE
Region 3
517 Gold Avenue S.W.
Albuquerque, New Mexico 87102

2260
November 19, 1973

Mr. Lee S. Garner, Director
New Mexico Livestock Board
P. O. Box 2048
Albuquerque, New Mexico 87103

Dear Mr. Garner:

This will acknowledge receipt of your letter dated November 14, 1973, whereby you assert ownership and regulatory rights over any horse, mule or ass found running at large upon public or private lands.

This will advise you that I have referred your letter to our Office of General Counsel for their response. Once they have fully reviewed your letter, we will advise you of how your claim will be processed. However, I feel it my responsibility to advise you that we fully intend to enforce Title 16, Section 1331, et seq., U.S.C.A. and the corresponding Secretary of Agriculture's Regulation 36 CFR 231.11 as they pertain to the protection, management and control of "wild, free-roaming horses and burros" on National Forest System lands.

As per your request, the "Cooperative Agreement" of August 7, 1973, between the New Mexico Livestock Board, the U.S. Department of Agriculture (by the Forest Service) and U.S. Department of Interior (by the Bureau

of Land Management) will be considered terminated as of January 14, 1974. We assume that you will continue to honor the agreement until the 60 day period has lapsed and take no contrary actions during this period. Hopefully, we can have our Office of General Counsel review the claim by this time.

Sincerely,

/s/ Wm. D. Hurst
WM. D. HURST
Regional Forester

[PLAINTIFFS' EXHIBIT 4]

NEW MEXICO LIVESTOCK BOARD

November 15, 1973

Mr. Art Zimmerman, State Director
Bureau of Land Management
U.S. Department of Interior
P. O. Box 1449
Santa Fe, New Mexico 87501

Dear Mr. Zimmerman:

This is to advise you that the New Mexico Livestock Board, on behalf of the State of New Mexico, hereby asserts ownership and regulatory rights over any horse, mule or ass found running at large upon public or private lands, in New Mexico, whose owner is unknown, whether branded or unbranded, or which animal is branded with a brand which is not on record in the office of the New Mexico Livestock Board, as per the definition of "estray" animals, 47-14-1, N.M.S.A. (1953 Comp.)

Implementation of the New Mexico Estray Law, Chapter 47, Article 14, N.M.S.A., is provided for in the "Wild Horse Act", at Title 16, Sec. 1335, U.S.C.A. The New Mexico Livestock Board, pursuant to this section of the Federal "Wild Horse Act", and pursuant to the estray laws of New Mexico, hereby serves notice that it intends to exercise its powers under these statutes to regulate, impound, or take up such estray horses, mules or asses, as defined above. Also, pursuant to 47-14-5 and 47-14-6, N.M.S.A. (1953 Comp.) and Title 16, Sec. 1335, U.S.C.A., the New Mexico Livestock Board intends to exercise its right to sell said impounded estray animals to private individuals, if said estray animals shall not be claimed after publication and posting of notice as required by Chapter 47, Article 14, N.M.S.A..

The New Mexico Livestock Board hereby serves notice that it is terminating the "Cooperative Agreement" of August 7, 1973, between the New Mexico Livestock Board, the U.S. Department of Agriculture (by the U.S. Forest Service), and the U.S. Department of the Interior (by the Bureau of Land Management), as per Sec. C. Paragraph 3, of the agreement which provided that it ". . . can be terminated by any party upon 60 days written notice of the others." This letter shall constitute the written notice by which said agreement shall be terminated in 60 days.

To the extent that the Chapter 47, Article 14, N.M.S.A. definition of "estray" conflicts with the Federal "Wild Horse Act" definition of "wild free-roaming horses and burros", the New Mexico Livestock Board hereby serves notice that it intends to exercise all regulatory impoundment and sale powers which it derives from the New Mexico Estray Law, over all estray horses, mules or asses found running at large upon public or private lands within New Mexico, as defined in the New Mexico Statutes above. This includes the right to go upon Federal or State lands to take possession of said horses or burros, should the Livestock Board so desire.

As an additional basis of the authority of the State of New Mexico, through the New Mexico Livestock Board, to assert jurisdiction, ownership and regulatory powers over these estrays, it is hereby asserted that all non-migratory animals within the boundaries of the State of New Mexico belong to the people of the State, whether said animals are on Federal or State lands, and that the ownership of said wild animals, so far as they are capable of ownership, is in the State of New Mexico, in its sovereign capacity, as a representative, and for the benefit of all its people. The State of New Mexico has the right to control and regulate the common property in these wild animals within its boundaries. Since these horses or burros are not the subject of interstate commerce, and are non-migratory, and since the Federal government is not asserting that said animals are damaging Federal

lands (whereby, arguably the Federal government may have the right to destroy said animals), the Federal government has no right to control, regulate or assert ownership of these animals.

Sincerely yours,

LEE S. GARNER, Director
New Mexico Livestock Board

LSG/lls

cc: Gerry Hopkins, Attorney
Modrall, Sperling, Roehl, Harris & Sisk

[PLAINTIFFS' EXHIBIT 5]

Fred H. Owensby, Assistant Director
New Mexico Livestock Board 2/21/74

REPORT OF: ESTRAY BURROS ON STEPHPNSON 1/X RANCH—CARRIZOZO, NEW MEXICO

Kelley Stephenson—Owner
Bill Stephenson —Son

February 4, 1974

I received a telephone call from Mr. Bill Stephenson, son of Mr. Kelley Stephenson, owner of the 1/X Ranch, whose ranch headquarters is located 10 miles south of Carrizozo on Highway 54, and 5 miles east.

Mr. Bill Stephenson reported the presence of approximately 25 head of burros in one herd that had recently appeared on lands owned or leased by 1/X Ranch and were causing problems in his livestock operation. The attached allotment map indicates the problem area comprising approximately 8,000 acres BLM lease, 1,000 acres State lease and 3,000 acres deeded land upon which the burros were found.

The following information was obtained from B. Stephenson during our conversation:

1. The area is customarily utilized as winter pasture for cows and calves which were moved into the area soon after January 1, 1974. As a winter supplement feed, protein blocks are put out for the cattle periodically at the various wells (4). The burros approximately 25 head, were first observed about January 20 on a routine check by Stephenson's of the cattle and to put out feed. Stephenson reports he saw the burros eating the feed and runing the cattle from feed.

2. Although a few burros had been seen during past years in the higher country to the South and East, they were never a problem. They had never seen any numbers concentrated in an area, particularly the lower flat lands. The twenty-five appeared to be fairly gentle.

Stephenson asked if the New Mexico Livestock Board could help with the estray or trespass burros. I informed Stephenson if he could pen the animals, I would send an inspector to try to determine ownership. Mr. Stephenson felt he would have no problem in corralling burros at the pens located at Taylor Wells.

Upon reporting to Mr. Garner the above information, he instructed me to proceed under the Estray Laws and offer assistance to Stephenson, if needed. (See letter to Mr. Bill Stephenson, February 5, 1974).

February 6, 1974

Mr. Kelley Stephenson, owner of 1/X Ranch appeared in my office to further explain the problem and informed me he was concerned about the damage caused by the burros, i.e., cost of feed consumed, and danger to the baby calves.

He reported that he had visited the BLM office in Las Cruces a few days prior and was shown pictures of the burros around Taylor Wells standing the cattle off from feed. The pictures were reportedly taken, unknown to him at the time, approximately Jan. 15. When he inquired from the Asst. Manager of BLM, Charles Hodgins, what they would do about the burros, he was told "the cows will have to go".

Additional information from Mr. K. Stephenson:

Mr. Tom Ryan, former owner of Three Rivers TR Ranch, had purchased several loads of burros about 18 years ago and turned them out to pasture adjacent to the 1/X Ranch.

The TR Ranch sold to Charles Level approximately 18 months ago. Mr. Harold Shepard is foreman for the present owner of TR Ranch.

February 6

Deputy Inspector Commission Cards were prepared for Bill Stephenson, Earl Brogg—employee of $\frac{1}{X}$ Ranch and Harold Shepard.

Contacted Inspectors Allen, Claude Foster, Gerald Cozby of the action we would take. Instructed Inspector Allen to make arrangements with Stephenson to impound the burros at Taylor Wells pens.

February 10

Inspector Allen informed me that plans were complete to gather the burros, Monday, February 11, P.M.

Mr. Garner requested my presence during the gathering, and to handle the impoundment and disposition of the burros as necessary.

February 11

Arriving at the $\frac{1}{X}$ Ranch, Monday, February 11, A.M., B. Stephenson and I traveled by jeep from head quarters to the pasture shown on allotment map toward Taylor Wells. During our journey I observed one lone burro (probably a Jack) about ⅓ distance up the range of mountains toward east boundary approximately 5 miles south of headquarters. About 3 miles further south I observed two head grazing (probably jennies) approximately ½ distance up hillside. Stopping at water tanks shown on map, I observed a few tracks at each well. As we approached Taylor Wells, and approximately 200 feet from road, I observed six head of burros.

In early afternoon the Inspectors named above arrived with horses and with assistance of B. Stephenson, Harold Shepard and two employees, nineteen head of burros (including the six near the road were gathered in the south and west area. It appeared that several head might be branded, however, after catching and restraining them by hand, no brands were found. We were unable to locate any more burros in the immediate area.

Subsequently I contacted Jerry Shaw at the Roswell Livestock Auction to inquire if he could handle the burros and place them in the sale, Monday, Febraury 18, if we could not determine ownership. Inspector Cozby contacted Leonard Baird, trucker, from Alamogordo, who was available this date to haul them to Roswell.

Upon arrival at Roswell Livestock Auction, the nineteen head were reinspected by Inspector Don Williams and found to be no brands.

A legal Notice of Estray and advertisement of sale was placed in the Alamogordo Daily News, February 14.

Sale of the burros was by public auction at Roswell Livestock Commission Co., Roswell on February 18. The proceeds (less trucking and sale expense) will be submitted to the New Mexico Livestock Board.

The following information was obtained from persons listed below who had knowledge of the burros in the Three Rivers area:

TOM RYAN —Former owner of Three Rivers (TR) Ranch
Purchased several loads of burros in El Paso in mid 1950's. Sold 103 head to Leonard Baird in July 1955. Turned several head out to pasture. Would round them up occasionally for "Kids" to ride. Enjoyed having them around (burros and kids).

HENRY VEGA —Carrizozo—Worked as truck driver in 1955
Hauled two loads of burros from El Paso to TR Ranch in 1955 or 1956.

AMADOR MARTINEZ—Rancher
Employed by Tom Ryan when burros were purchased. Branded several head 1963.

JIM RANDALL	—Former employee of Ryan Presently employed by new owner of TR Ranch, Charles Level. Helped brand burros 1963.
LEONARD BAIRD	—Trucker-Rancher, Alamogordo Purchased 103 burros from Ryan 1955. Shipped out of state. Believe Ryan kept approximately 25 head for ranch.

[PLAINTIFFS' EXHIBIT 6]

FOREST SERVICE MANUAL
TITLE 5300—TRESPASS

5333.48—Disposal of Impounded Livestock

MEMORANDUM OF UNDERSTANDING

NEW MEXICO LIVESTOCK BOARD

FOREST SERVICE
U.S. DEPARTMENT
OF AGRICULTURE

This Memorandum of Understanding made in duplicate this 3rd day of April 1969, by and between the New Mexico Livestock Board, hereinafter called the Board, and the United States Forest Service through the Regional Forester of Region 3, hereinafter called the Forest Service;

WHEREAS, the Board has been created under the laws of the State of New Mexico to provide an adequate system of control and regulation for livestock ownership, transportation, and disease prevention; and

WHEREAS, it is the mutual desire of the Board and the Forest Service to work in harmony for the common purpose of solving problems of estray and trespass animals in National Forests and National Grasslands in the State of New Mexico.

NOW, THEREFORE, the Board and the Forest Service mutually agree:

1. That unbranded or unmarked horses, mules, asses, cattle, sheep or goats impounded by the Forest Service on National Forests and National Grasslands will be turned over to the Board for disposal. The Board will reimburse the Forest Service for impoundment costs up to the net sale price of the animal(s). Amounts realized from the sale in excess of Forest Service costs will be retained by the State.

2. The Board will recognize the impoundment and sale procedures of branded horses, mules, asses, cattle, sheep or goats under Secretary of Agriculture's Regulation 36 CFR 261.13, provided that bills of sale are notarized or acknowledged in accord with New Mexico State Law.

3. That impounded swine of unknown ownership will be turned over to the Board for disposal in a manner similar to the procedure described in paragraph 1 above. Swine of known ownership will be disposed of by the Forest Service under the provisions of 36 CFR 261.13 as shown in paragraph 2 above.

4. That this Memorandum of Understanding supersedes and replaces similar memorandums dated September 16, 1964, between the Forest Service and the Cattle Sanitary Board of New Mexico and the Sheep Sanitary Board of New Mexico.

U.S. FOREST SERVICE

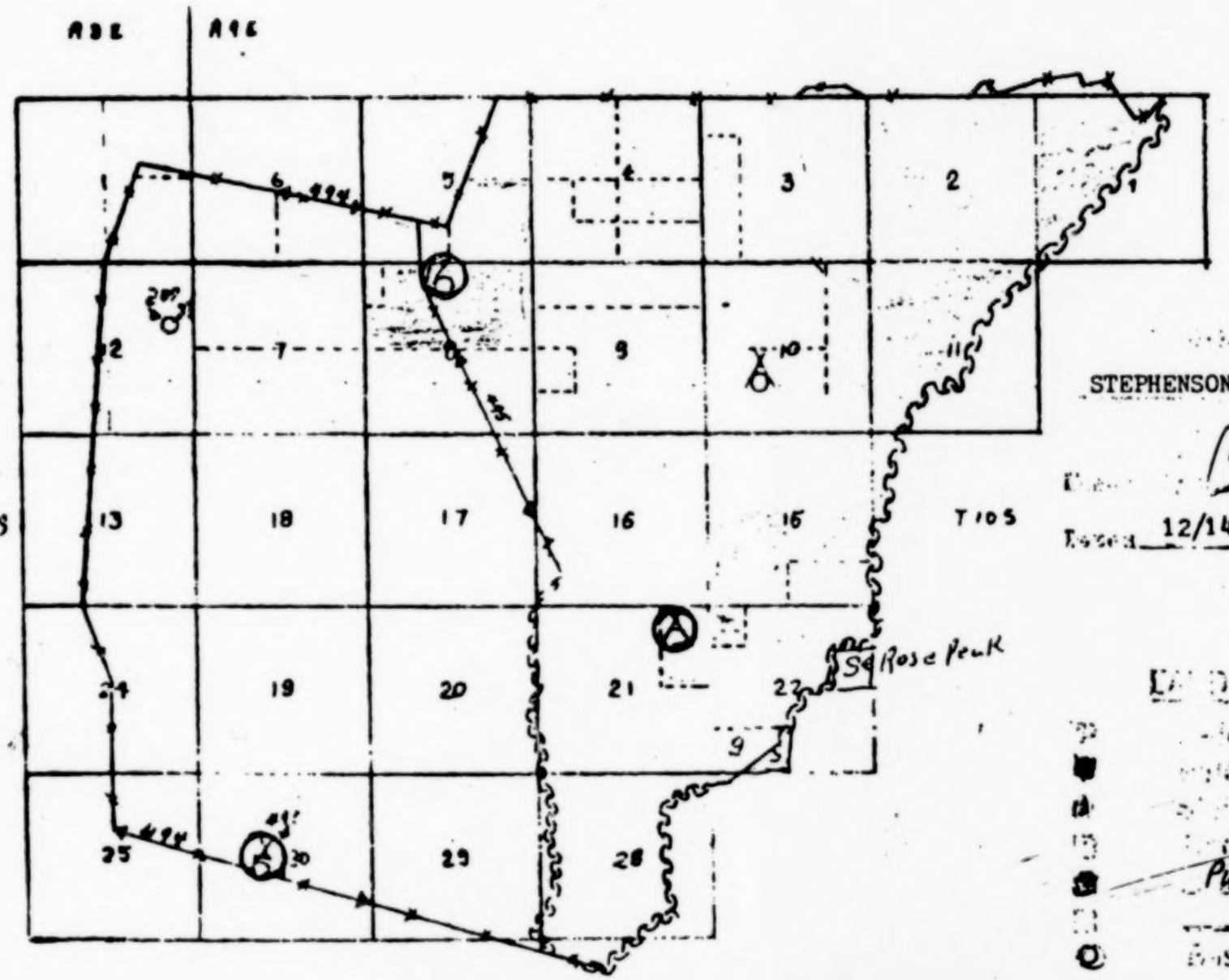
4/4/69 — /s/ Wm. D. Hurst
Date — Regional Forester

NEW MEXICO LIVESTOCK BOARD

4/16/69 — /s/ Lee S. Garner
Date — Director

4/16/69 — /s/ John L. Huning
Date — Chairman

[PLAINTIFFS' EXHIBIT 7]



STEPHENSON RANCH INC.

Charles D. Hodgson

Date 12/14/70 Title Area Mgr.

LAND STATUS LEGEND

- Forest Range
- Reserved Land
- State Land
- Unreserved Land
- PUBLIC WATER RESERVE
- Base Water

PLAINTIFF'S EXHIBIT 7

74-127 Civ

[PLAINTIFFS' EXHIBIT 12]

Bureau of Land Management
Santa Fe, New Mexico 87501
Kline—982-3801, Ext. 316
September 21, 1973
For Immediate Release

FEW WILD HORSES AND BURROS IN NEW MEXICO

Wild horses and burros are proving almost unknown on federal public lands in New Mexico.

Robert Buffington, acting state director for the Bureau of Land Management, said today that the claiming process for horses using BLM lands is at the half-way point without turning up positive evidence of wild horses or burros on BLM lands.

The claiming process, which began August 15, was set up under the Wild Horse and Burro Act of 1971, and is intended to protect and control wild and free-roaming horses and burros on lands under the administration of BLM and the Forest Service.

"We have held numerous meetings in all BLM districts in New Mexico," Buffington said. "We have met with our advisory boards, and with the general public in widely separated communities representing 13.6 million acres of BLM lands in New Mexico. In only one or two instances to date have animals been mentioned as possibly wild horses or burros. These animals are very few in number and there are doubts as to how wild they are. Some are believed to be geldings."

Buffington said some of the animals presently viewed as wild actually may be claimed by owners before the November 15, 1973 deadline.

"We are only half way through the claiming process," he said. "Animals claimed to date unquestionably belong to those who have claimed them, even though unbranded. For example, one rancher claimed an unbranded stallion and produced registration papers to prove ownership."

Buffington said his agency had checked out a report of an illegal "wild horse" roundup in the Las Cruces district. It consisted of a rancher gathering about seven ranch horses—six geldings and a stud—and selling them at auction.

"The state brand inspector looked at every one of them and verified that they were ranch horses," Buffington reported.

Under the claiming process, owners of horses using the public lands must submit claims of ownership prior to November 15, 1973. Unbranded and unclaimed horses remaining on the public lands after that date will, under the Act, be protected and managed as wild, free-roaming horses and burros.

* * * *

[DEFENDANT'S EXHIBIT A]

COOPERATIVE AGREEMENT

NEW MEXICO LIVESTOCK BOARD
FOREST SERVICE

U.S. DEPARTMENT OF AGRICULTURE
BUREAU OF LAND MANAGEMENT

U.S. DEPARTMENT OF THE INTERIOR

This Cooperative Agreement made August 7, 1973, by and between the New Mexico Livestock Board, herein after called the Board, the United States Forest Service through the Regional Forester of Region 3, responsible for administration of National Forests and National Grasslands, hereinafter called the Forest Service, and the Bureau of Land Management through the State Director, responsible for administration of National Resource Lands, hereinafter called the Bureau;

WHEREAS, the Board has been created under the laws of the State of New Mexico to provide an adequate system of control and regulation for livestock ownership, transportation, and disease prevention; and

WHEREAS, it is the desire of the Forest Service and the Bureau to effectively manage the wild free-roaming horses and burros located on National Forest System lands and National Resource lands, or that may wander from such lands; and

WHEREAS, it is the mutual desire of the Board, the Forest Service, and the Bureau to work in harmony for the common purpose of solving problems of estray and trespass animals in National Forest, National Grasslands, and National Resource lands in the State of New Mexico, NOW, THEREFORE, the Board, the Forest Service and the Bureau mutually agree:

A. *Estray Animals*—(This section applies to only those horses and burros which do not meet the definition of wild free-roaming horses and burros under section B 1.)

1. That unbranded or unmarked and branded of unknown ownership horses, mules, asses, cattle, sheep or goats impounded by the Forest Service or the Bureau on National Forest, National Grasslands, and National Resources lands will be turned over to the Board for disposal. The Board will reimburse the Forest Service or the Bureau, whichever is appropriate, for impoundment cost up to the net sale price of the animal(s). Amounts realized from the sale in excess of Forest Service or Bureau costs will be retained by the State.

2. The Board will recognize the impoundment and sale procedure of branded horses, mules, asses, cattle, sheep or goats "of unknown ownership" under Secretary of Agriculture's Regulations 36 CFR 261.13 and the Bureau's authority under 43 CFR 9239.3, provided that bills of sale are notarized or acknowledged in accord with New Mexico State law. All livestock sold under this section must be inspected as per the Board's regulation and the owner issued the necessary certificate upon removal of animal(s) from National Forest System lands or National Resource lands.

3. That impounded swine of unknown ownership will be turned over to the Board for disposal in a manner similar to the procedures described in paragraph 1 above. Swine of known ownership will be disposed of by the Forest Service or the Bureau under the provision of 36 CFR 261.13 or 43 CFR 9239.3 as shown in paragraph 2 above.

B. *Wild Free-Roaming Horses and Burros*

The Board will recognize the authority of the Forest Service and the Bureau under the Act of December 15, 1971 (P.L. 92-195) to manage and protect wild free-roaming horses and burros on National Forest System lands and National Resource lands or those that may wander from such lands. The Board, Forest Service, and

Bureau specifically agree to the following procedures in the administration of these regulations:

1. "Wild free-roaming horses and burros" shall mean all unbranded and unclaimed horses and burros that have used lands of the National Forest System or National Resource lands on or after December 15, 1971, or do hereafter use these lands as all or part of their habitat. Unbranded claimed horses and burros, where the claim is found to be erroneous, are also considered as wild and free-roaming if they meet the criteria above. However, this definition shall not include any horse(s) or burro(s) introduced onto National Forest System lands or National Resource lands on or after December 15, 1971, by accident, negligence, or willful disregard of private ownership.

2. The Forest Service and Bureau will recognize private ownership claims for unbranded horses and burros when fully supported by evidence in accord with State branding and estray laws. As a minimum, a claimant will provide:

a. A written claim submitted to the Bureau and/or the Forest Service.

b. A valid bill of sale as per New Mexico Statutes 1953, Sections 47-9-19 and 47-9-19.1 which fully describe the claimed animals, or

c. An inspection certificate issued by the Board for some previous occasion which clearly identified the animal(s) as belonging to the claimant, or

d. A brand exemption certificate for some previous occasion as required by rules and regulations of the Board.

3. The Forest Service and/or the Bureau and the Board will jointly evaluate ownership claims lacking approved supporting documents when said animals are on or have been known to come from National Forest System lands or National Resource lands where wild free-roaming horses and burros are known or suspected to exist. Where evidence is lacking for valid claims, the animals will come under the jurisdiction of the Forest Service and/or

the Bureau. Facts, such as, but not limited to the following, will be considered in determining ownership claim validity:

a. Affidavit signed by claimant indicating a willingness to defend title and setting forth the following: Number of animals and date animals were released upon the open range.
b. Evidence of payment of personal property tax upon the claimed animals.
c. Evidence of grazing license or permit for such animals.
d. Location of relevant private or leased lands.
e. Broken to a rope.
f. Broken to a saddle.
g. Gelded.
h. Mare of known private ownership with current progeny.
i. Have other marks such as tattoos, tags or man-created blemishes, clearly visible.

4. Wild, free-roaming horses and burros transported by driver or vehicle onto, within, or from National Forest System lands or National Resource lands will be done in accordance with rules and regulations of the Forest Service and/or the Bureau and the Board.

C. *Administrative*

1. *Restriction of Congressional Delegates or Resident Commissioner*

No member or delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this agreement, or to any benefit which may arise therefrom.

2. *Discrimination*

All cooperative work under the provisions of this agreement or supplemental agreements or memorandums of understanding will be accomplished without discrimination against any person because of race, creed, color, sex, or national origin.

3. This cooperative agreement is effective on the date last entered below and supercedes and replaces similar memorandum dated April 3, 1969, between the Forest Service and the Cattle Sanitary Board of New Mexico. This cooperative agreement will be reviewed every two years, and can be terminated by any party upon 60 days written notice to the others.

NEW MEXICO LIVESTOCK BOARD

7/3/73 — /s/ LEE S. GARNER
Date — Director

FOREST SERVICE

7/2/73 — /s/ WM. D. HURST
Date — Regional Forester

BUREAU OF LAND MANAGEMENT

Aug. 7, 1973 — /s/ R. BUFFINGTON
Date — Acting State Director

[Caption omitted; filed March 7, 1975]

ORDER

This matter coming on for hearing upon the oral motion of the United States Attorney for the District of New Mexico for an order staying the judgment in this action pending further order of the Court, and the United States Attorney having given the Court his assurance that a formal motion for a stay will be filed within five (5) days hereof, and plaintiffs having no objection to the granting of a stay pending the filing of such a motion, and further providing that plaintiffs have an adequate opportunity to respond to such a motion for stay, and the Court being fully advised in the premises,

IT IS ORDERED that the judgment filed herein on February 28, 1975 be, and the same hereby it, stayed until further order of this Court.

_____
United States Circuit Judge

/s/ H. Vearle Payne
United States District Judge

/s/ E. J. Mechem
United States District Judge

Approved as to form:
/s/ G. J. Hopkins
Att'y for Plaintiffs

[Caption omitted; filed March 18, 1975]

MOTION TO STAY JUDGMENT PENDING APPEAL

Defendant(s) appearing by Victor R. Ortega, United States Attorney, District of New Mexico, and James B. Grant, Assistant United States Attorney, respectfully move the Court, pursuant to Rule 8, F.R. App. P., for a stay of the judgment entered by the District Court on February 28, 1975, a copy of which is attached.

Defendants Rogers C. B. Morton and the United States of America have heretofore moved this Court to alter or amend the judgment, under Rule 59(e) F.R.C.P., to delete the name of Victor R. Ortega, United States Attorney for the District of New Mexico as one of the named defendants as having been previously dismissed from this action and further to dismiss this action as to the United States of America for lack of jurisdiction over the subject matter. Notice of Appeal to the United States Supreme Court will be timely filed by the appropriate defendant after the Court's ruling upon said motion.

In support of the instant motion to stay the judgment pending appeal, defendant(s) attach hereto affidavits of James Gabettas, Acting District Manager, Boise District, BLM, and D. Dean Bibles, District Manager, Susanville District, BLM.

The attached affidavits substantiate the various reports received by the office of the United States Attorney since the Court's judgment issued on February 28, 1975 that the spoliation has begun and irreparable harm to the public interest is occurring and will continue to occur if this judgment is not stayed pending appeal. Grass on the public domain will grow again but the killing of each wild horse or burro is an irretrievable loss.

Congress has manifested its intent and policy to protect from capture, branding, harassment, or death all wild free-roaming horses and burros (16 USC § 1331) and assumed its Congressional enactment of a public law to facilitate and ensure that public policy was within its

constitutional authority. A division of opinion between this Court and that body should not work to militate against that policy until final disposition of the controversy by the Supreme Court.

Respectfully submitted,

VICTOR R. ORTEGA
United States Attorney

/s/ James B. Grant
Assistant U.S. Attorney

SUPREME COURT OF THE UNITED STATES

No. 74-1488

SECRETARY OF THE INTERIOR, APPELLANT

v.

NEW MEXICO ET AL.

Appeal from the United States District Court
for the District of New Mexico

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

October 6, 1975

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 598230 97

Supreme Court, U. S.
FILED
AUG 13 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1488

ROGERS C. B. MORTON, Secretary of the Interior,
Appellant,

vs.

STATE OF NEW MEXICO, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
(THREE-JUDGE COURT) FOR THE DISTRICT OF NEW MEXICO

MOTION TO DISMISS OR AFFIRM

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INDEX

Motion to Dismiss or Affirm 1

Constitutional Provisions and Statutes Involved 2

Questions Presented 3

Statement of the Case 3

Summary of Argument 4

Argument—

I. Whether the Wild Free-Roaming Horses and Burros Act is in excess of the power of Congress under the Property and Commerce Clauses of the U. S. Constitution 7

II. Whether the Act intrudes upon the sovereignty and legislative authority of the State as attested to by the Tenth Amendment, and undermines the traditional concepts of State powers over resident wild animals 19

Conclusion 26

Citations

CASES

A. E. Nettleton Co. v. *Diamond*, 264 N.E.2d 118 (N.Y. 1970) 22

Afroyim v. *Rusk*, 387 U.S. 253 (1967) 8

Alabama v. *Texas*, 347 U.S. 272 (1954) 9

Arkansas State Game and Fish Commission v. *W. R. Wrape Stave Co.*, 76 F. Supp. 323 (E.D. Ark. 1948) 22

Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 (1936) 11, 12

Barrett v. *State of New York*, 116 N.E. 99 (N.Y. Ct. App. 1917) 22
Camfield v. *United States*, 167 U.S. 518 (1897) 10
Carey v. *South Dakota*, 250 U.S. 118 (1919) 22
Chalk v. *United States*, 114 F.2d 207 (4th Cir. 1940), *cert. den.* 312 U.S. 679 (1941) 16
Clason v. *State of Indiana*, 306 U.S. 439 (1939) 24
Colorado v. *Toll*, 268 U.S. 228 (1925) 10
Elm City Broadcasting Corp. v. *United States*, 235 F.2d 811 (D.C. Cir. 1956) 18
Federal Compress and Warehouse Co. v. *McLean*, 291 U.S. 17 (1934) 25
Federal Power Commission v. *State of Oregon*, 349 U.S. 435 (1955) 13
Foster-Fountain Packing Co. v. *Haydel*, 278 U.S. 1 (1928) 21
Geer v. *Connecticut*, 161 U.S. 519 (1896) 19, 21, 23
Gibson v. *Chouteau*, 80 U.S. (13 Wall.) 92 (1871) 9
Haskell v. *United States*, 241 F.2d 790 (10th Cir. 1957), *cert. den.* 354 U.S. 921 (1957) 18
Hunt v. *United States*, 278 U.S. 96 (1928) 8, 21
Kansas v. *Colorado*, 206 U.S. 46 (1907) 10
Kansas Pac. Ry. Co. v. *Atchison, T. & S.F. R. Co.*, 13 F. 166 (C.C.A. Kan. 1881), *reversed on other grounds* 112 U.S. 414 (1884) 13
Lacoste v. *Department of Conservation*, 263 U.S. 545 (1924) 20, 21
Matthews v. *Handley*, 179 F. Supp. 470, *aff'd* 361 U.S. 127 (1960) 8
McCready v. *Virginia*, 94 U.S. 391 (1865) 20, 21
Milk Wagon Drivers Union of Chicago v. *Meadowmoor Dairies*, 312 U.S. 287 (1941) 17

Missouri v. *Holland*, 252 U.S. 416 (1920) 8, 22
Newhall v. *Sanger*, 92 U.S. 761 (1875) 13, 14
New Mexico State Game Commission v. *Udall*, 410 F.2d 1197 (10th Cir. 1969), *cert. den.* 396 U.S. 961 (1969) 22
N.L.R.B. v. *Plasterers' Local Union No. 79*, 404 U.S. 116 (1971) 18
Oklahoma v. *Texas*, 258 U.S. 574 (1922) 15
Oregon v. *Mitchell*, 400 U.S. 112 (1970) 25
Patsone v. *Pennsylvania*, 232 U.S. 138 (1914) 21
Penn Dairies v. *Milk Control Commission*, 318 U.S. 261 (1943) 25
Rainier Nat. Park Co. v. *Martin*, 23 F. Supp. 60 (W.D. Wash. 1938), *aff'd* 302 U.S. 661 (1938) 16
Ruddy v. *Rossi*, 248 U.S. 104 (1918) 9
Silz v. *Hesterberg*, 211 U.S. 31 (1908) 21
South Carolina v. *United States*, 199 U.S. 437 (1905) 19, 25
State of Maine v. *Tamano*, 357 F. Supp. 1097 (D. Me. 1973) 22
State of Maryland v. *Amerada Hess Corp.*, 350 F. Supp. 1060 (D. Md. 1972) 22
State of Nebraska v. *State of Wyoming*, 325 U.S. 589 (1945) 13
Surplus Trading Co. v. *Cook*, 281 U.S. 647 (1930) 10
Tampa Electric Company v. *Nashville Coal Co.*, 276 F.2d 766 (6th Cir. 1960), *reversed on other grounds* 365 U.S. 320 (1961) 18
Toomer v. *Witsell*, 334 U.S. 385 (1948) 20, 21, 22
Townsend v. *Yeomans*, 301 U.S. 441 (1937) 25
United States v. *Alaska*, 423 F.2d 764, *cert. den.* 400 U.S. 967 (1971) 14

United States v. *Chicago*, 48 U.S. 185 (1849) 13-14
United States v. *Kipp*, 369 F. Supp. 774 (D. Mont. 1974) 13, 14
United States v. *Oregon*, 366 U.S. 643 (1961) 18
United States v. *Plott*, 345 F. Supp. 1229 (S.D. N.Y. 1972) 22
United States v. *State Tax Commission of Mississippi*, 412 U.S. 363 (1973) 12, 13
Utah Power and Light Co. v. *United States*, 243 U.S. 389 (1917) 9
Ward v. *Race Horse*, 163 U.S. 504 (1896) 21, 25
Wilcox v. *Jackson*, 38 U.S. 418 (1839) 13
Wilson v. *Cook*, 327 U.S. 474 (1946) 23
Yellowstone Park Transp. Co. v. *Gallatin County*, 31 F.2d 644 (9th Cir. 1929), *cert. den.* 280 U.S. 555 (1929) 16

CONSTITUTION AND STATUTES

United States Constitution
Property Clause, Art. IV, Sec. 3 .....7, 9, 11
Commerce Clause, Art. I, Sec. 8 17
Amendment X 21, 25
16 U.S.C. §1-3 15
16 U.S.C. §26 15
16 U.S.C. §98-99 15
16 U.S.C. §201, 221 15
16 U.S.C. §671-697a 15
40 U.S.C. §255 .....12, 13
Endangered Species Act of 1973, 16 U.S.C. (Supp. III) §1531 *et seq.* at §1533(d) 15
Fur Seal Act of 1966, 16 U.S.C. §1151 *et seq.* 16, 17

Marine Mammal Protection Act of 1972, 16 U.S.C. (Supp. III) §1361 *et seq.* 16, 17
National Wildlife Refuge System Act, 16 U.S.C. §668dd-668ee 15
The Pickett Act, 36 Stat. 847, 43 U.S.C. §141 13
Wild and Scenic Rivers Act, 16 U.S.C. §1271 *et seq.* at §1284 15
Wild Free-Roaming Horses and Burros Act, 85 Stat. 649-651, 16 U.S.C. (Supp. III) §1331-1340 .....4, 7, 8, 16, 17, 19, 22
47-23-1, 6 New Mexico Statutes Annotated (1973 Pocket Supp.) 2, 24
1891 Mont. Laws 262, February 14, 1891 16
1901 Session Washington Laws 192 16
1915 North Carolina Laws 205, North Carolina Code Annotated (1939) 16
Act Admitting State of Wyoming into the Union, July 10, 1890, 26 Stat. 222 16
Act of the Legislature of Colorado, approved May 2, 1927, see 16 U.S.C. §117 16

OTHER MATERIALS

General Services Administration, Washington, D.C., *Inventory Report on Real Property Owned by the United States Throughout the World, as of June 30, 1967*, Table 4, p. 46 17
Hagenstein, *One Third of the Nation's Land*, 12 Natural Resources Journal 56, at 59 (1972) 13, 14
Held, *Whose Public Lands?*, 7 Natural Resources Journal 153 (1967) 13
Webster's Third New International Dictionary 1836 (1966) 14

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1488

ROGERS C. B. MORTON, Secretary of the Interior,
Appellant,

vs.

STATE OF NEW MEXICO, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
(THREE-JUDGE COURT) FOR THE DISTRICT OF NEW MEXICO

MOTION TO DISMISS OR AFFIRM

Appellees move the Court to dismiss the appeal herein, or in the alternative, to affirm the Judgment of the United States District Court for the District of New Mexico on the ground that the questions presented are so insubstantial as not to need further argument.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Appendix F and Appendix G to the Jurisdictional Statement contain the text of the Wild Free-Roaming Horses and Burros Act, 85 Stat. 649-651, 16 U.S.C. (Supp. III) §1331-1340, Dec. 15, 1971, and certain pertinent provisions of the New Mexico Estray Statutes. Page 2 of the Jurisdictional Statement sets forth the Property Clause of the United States Constitution. The Tenth Amendment of the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Appellees deem other provisions of the New Mexico statutes pertinent herein:

> 47-23-1. N.M.S.A. Short Title—Purpose. This Act (47-23-1 to 47-23-7) may be cited as "The Livestock Board Act". The Livestock Board Act shall be liberally construed to carry out its purposes which are to promote greater economy, service and efficiency in the administration of the laws relating to the livestock industry of New Mexico. (1973 Pocket Supp.)
>
> 47-23-6. N.M.S.A. Additional Powers of the Board. . . . the New Mexico Livestock Board shall have the following powers:
>
> (1) To exercise general regulatory supervision over the livestock industry of this State in order to protect the industry from theft and contagious or infectious diseases and in order to protect the public from diseased or unwholesome meat or meat products; . . . (1973 Pocket Supp.)

QUESTIONS PRESENTED

1. Whether the Wild Free-Roaming Horses and Burros Act is in excess of the power of Congress under the Property and Commerce Clauses of the U. S. Constitution.

2. Whether the Act intrudes upon the sovereignty and legislative authority of the State as attested to by the Tenth Amendment, and undermines the traditional concepts of State powers over resident wild animals.

STATEMENT OF THE CASE

Appellees deem several matters contained in the Jurisdictional Statement to require clarification, and wish to set forth other matters omitted by the Jurisdictional Statement.

At pages 4-5 of the Jurisdictional Statement, Appellant sets forth some of the facts giving rise to the filing of the complaint below, and the three-judge court's disposition of the cause. Appellees would supplement that summary as follows:

1. The burros which are the subject of this litigation were at all times material hereto freely roaming upon private, state and federal lands; primarily upon private lands (Tr. 34-37; 39; 50).

2. The subject animals proliferate rapidly and disrupt livestock operations (Tr. 8-9; 41-42; 44; 55-56).

3. The New Mexico rancher requested assistance from the New Mexico Livestock Board only after the United States Bureau of Land Management had refused to remove

the subject animals from the mixed private-state-federal property (Tr. 40-41; 49; Pl. Ex. 5; Memorandum Opinion of the court below, at p. 2).

4. There is no interstate or international migration of the wild horses and burros which reside in the State of New Mexico (Tr. 9-11).

5. The decision below was not, as indicated by Appellant, based upon cross-motions for summary judgment; the court below held an evidentiary hearing. The decision is based upon the testimony, exhibits and other evidence introduced at that hearing, and upon trial briefs submitted by the parties.

The Act itself fails to mention or make any finding regarding interstate commerce, and no evidence of such is before this Court. The Act makes no withdrawal, reservation or condemnation of the lands which are the subject of the Act, but is applicable to the general public domain. Congress has made no setting aside of a sanctuary or refuge for the particular purpose herein.

SUMMARY OF ARGUMENT

The decision below should be affirmed, or in the alternative, this appeal should be dismissed, because there is no specific delegation of power to Congress which would enable Congress to enact the Wild Free-Roaming Horses and Burros Act.

The State legislative authority is still applicable to the lands which are the subject of the Act, and the United States does not exercise exclusive jurisdiction over said lands. No withdrawal, condemnation, purchase or reservation of the subject lands for this particular purpose has been made by Congress; the lands remain a part of the general public domain and subject to State legislative authority and traditional concepts of State powers over resident wild animals, as set forth by this Court in a number of opinions.

The authority of the United States to protect its lands is not at issue herein and will not sustain the Act; the Act was enacted to protect the subject animals, and not the land upon which they roam. The provisions in the Act regarding overpopulation are controls which the Act has provided to remedy problems which will be *caused by* the Act.

Neither the statute itself, nor the portions of the Committee Reports quoted by Appellant, contain any language regarding interstate commerce or any effect thereon. The Act itself is, by its express terms, based upon the Property Clause and not the Commerce Clause. There is no evidence before this Court from the proceedings below indicating any connection with or effect upon interstate commerce, and in fact, the evidence is to the contrary. The Commerce Clause is inapplicable herein.

The subject animals are not internationally migratory, nor is such found by the statute itself. There is no federal treaty regarding the subject animals.

This Court has not, to date, ever sustained the exaggerated federal powers asserted by Appellant herein, to wit: that any animal which happens to come in contact with federal property, however briefly, is transmuted into federal property at that instant. This Court has repeatedly held that the States, as owners in trust of resident wild animals, exercise all powers with regard to such

animals: the power to determine ownership, the power to regulate and control the taking or destruction of such animals, and complete regulatory powers. By doing so with regard to the subject horses and burros herein, the State of New Mexico has not (nor is such alleged) discriminated against interstate commerce, infringed on the treaty powers of the federal government, damaged federal lands, or otherwise exceeded any of the constitutional limitations placed upon the States.

A further ground for affirming the decision below is the necessity for the State of New Mexico to have the legislative authority, through its police power, to operate the estray laws of this State so as to prevent the depredation caused by the subject animals, prevent the spread of contagious and infectious diseases among bovine animals, and to protect the life, health, welfare and property of the citizens of this State. The federal Act makes no provision therefor, and cannot, constitutionally.

To hold otherwise, Appellees submit, would virtually abrogate the rule of State sovereignty as attested to by the Tenth Amendment, undermine the doctrine of State trustee powers over resident wild animals, and virtually abrogate the fish and game, conservation, nonresident licensing, and estray laws of the respective States. Appellant's extravagant view of federal authority under the Property Clause would create completely independent and sovereign "federal states" within the States, if carried to its logical conclusion.

ARGUMENT

I.

Whether the Wild Free-Roaming Horses and Burros Act is in excess of the power of Congress under the Property and Commerce Clauses of the U. S. Constitution.

The question here presented is whether Congress may, under the Commerce or Property Clauses of the Constitution, assert exclusive possessory rights, all power to control and regulate, and the right to destroy (i.e., assert ownership of) all unbranded and "unclaimed" horses and burros which may at any time set foot upon Bureau of Land Management or Forest Service lands. The Wild Free-Roaming Horses and Burros Act by its terms also operates upon private and State lands, once the animal has been "transmuted" into federal property by contact with public domain lands. The federal lands affected have not been condemned, withdrawn or reserved for the particular purpose herein, but remain a part of the general public domain. No sanctuaries or refuges are established.

The Wild Free-Roaming Horses and Burros Act states, at §1331, that the animals are "an integral part of the natural system of the public lands." From this express finding, it is apparent that Congress attempted to ground the Act on the Property Clause: Article IV, Section 3 of the Constitution. As held by the court below, the Act cannot be sustained as an exercise of the powers granted to Congress by the Property Clause. The extravagant view of federal authority entertained by counsel for Appellant is without basis in the Constitution, as construed by the decisions of this Court to date.

The federal government is a body of strictly limited powers, and the powers which were not specifically delegated to the federal government were reserved to the sovereign States of the Union. *Afroyim* v. *Rusk*, 387 U.S. 253 (1967); *Matthews* v. *Handley*, 179 F. Supp. 470 (N.D. Ind. 1959), *aff'd* 361 U.S. 127 (1960).

Certain narrow federal powers with regard to wild animals have been sustained by this Court. For example, the federal Treaty power involving internationally migratory birds prevailed over state legislation in *Missouri* v. *Holland*, 252 U.S. 416 (1920); and, the federal government was permitted to undertake reasonable steps necessary to protect its lands from serious injury, in *Hunt* v. *United States*, 278 U.S. 96 (1928). *Missouri* is inapplicable herein; the animals are not the subject of a treaty, and are not internationally migratory.

Hunt is inapplicable, although at pp. 9-10 of its Statement, counsel for Appellant claims the Act to be constitutional under *Hunt*, because it was enacted to enable the Government to destroy horses and burros damaging federal property. The statute is aimed at protecting the wild horses and burros, not at protecting the land they live on. It is understandable that the Department of Agriculture, speaking in the Senate and House Reports quoted by Appellant, was concerned about *problems* which would be *caused by* the Wild Free-Roaming Horses and Burros Act. The potential damage to federal lands is a direct *result* of the Act itself, and not a *purpose* of the Act. This necessitated inclusion of the provisions in the Act which control the numbers of animals protected thereby. An attempt by statute to internally resolve a problem which the Act itself

creates can certainly not be construed as the purpose of, or a constitutional underpinning for, the Act.[1]

Under the Property Clause, Congress has been given the power only to make rules and regulations for property "belonging to the United States". This power extends only over lands belonging to the United States; it does not extend over resident species of wildlife. Appellant has overlooked the last phrase of Article IV, Section 3 of the Property Clause: "and . . . nothing in the Constitution shall be so construed as to prejudice any claim of the United States, or of any particular State."

The cases cited by Appellant, with their broad language regarding the powers of Congress under the Property Clause, are not authority that the Secretary can claim exclusive possession, completely regulate and control, and destroy resident species of wild animals which touch, however briefly, upon the general public domain. Those cases must be limited to their factual context—that is, the conditions which Congress may impose upon the disposal of federal lands. See, *Alabama* v. *Texas*, 347 U.S. 272 (1954); *Utah Power and Light Co.* v. *United States*, 243 U.S. 389 (1917); *Ruddy* v. *Rossi*, 248 U.S. 104 (1918); *Gibson* v. *Chouteau*, 80 U.S. (13 Wall.) 92 (1871).

It is well settled that the federal government may acquire lands necessary or convenient for the exercise of its powers within a State. Absent State consent or a cession of jurisdiction, exclusive jurisdiction does not accrue to the federal landowner. "It is not unusual for the United States to own within a state lands which are set apart and used

---

1. Had Congress desired to enact a constitutionally sound statute aimed at protecting the federal lands, it could, and undoubtedly would, have simply empowered the Secretary of Interior to destroy the horses and burros, or control their numbers, whenever the public domain was being damaged, or in imminent danger of such harm.

for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the state. On the contrary, the lands remain part of her territory and within the operation of her laws, save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal." *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 650 (1930) (Emphasis added); see also, *Colorado* v. *Toll*, 268 U.S. 228 (1925).

The State of New Mexico has made no such cession of jurisdiction with respect to the lands which are the subject of the Wild Free-Roaming Horses and Burros Act, and the right to regulate the subject animals remains in the State as an attribute of its sovereignty as discussed at Point II, *infra*.

This Court has on several occasions discussed the scope of the Property Clause, the decisions indicating that the power therein granted is of a protective nature and not one designed to intrude upon state authority. As declared by this Court in *Camfield* v. *United States*, 167 U.S. 518 (1897):

> While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a state, which it would have within a territory, we do not think the admission of a territory as a state deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, *so long as such power is directed solely to its own protection*. 167 U.S. at 525-26 (Emphasis added).

In *Kansas* v. *Colorado*, 206 U.S. 46 (1907) the Court stated:

> The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. That is implied by the words "territory or other property." It is true it has been referred to in some decisions as granting political and legislative control over the territories as distinguished from the states of the union. It is unnecessary in the present case to consider whether the language justifies this construction. Certainly we have no disposition to limit or qualify the expressions which have heretofore fallen from this Court in respect thereto. *But clearly it does not grant to Congress any legislative control over the states, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits.* 206 U.S. at 89 (Emphasis added).

The Act claims the right to possession, exclusive regulatory powers over, and control of the subject animals, even though the animals may wander onto private property, or remain upon private property indefinitely, subsequent to having touched upon BLM or Forest Service lands. This clearly contravenes long-established principles of ownership with regard to wild animals, and has no basis in the Property Clause. The federal lands defined in the Act surely cannot derive from the Property Clause these "Midas Touch" qualities which the Act seeks to create, instantaneously transmuting to federal property any object which happens to come in contact with the public land.

Appellant discusses *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1936), as holding that the powers of Congress under the Property Clause extend to "what the land contains". The decision is certainly not flexible enough to extend to the animals and the powers claimed herein.

In *Ashwander*, this Court held that the power of falling water, and the electric energy thus produced, were riparian rights which were acquired by the Government when it purchased the dam site; and that water powers and appurtenances thereto are regarded as real property. See 297 U.S. at 330-333. *Ashwander* is not inconsistent with the reversal hereinbelow; riparian and mineral rights in the land constitute real property rights which are obviously subject to the powers of the United States under the Property Clause.

Wild and free-roaming horses and burros do not issue from the soil, have not been dealt with in law as real property, are not "contained in the land", and are not within the scope of the Property Clause. Such a result would be entirely inconsistent with the numerous holdings of this Court concerning such wild animals, as set forth at Point II, below.

Ashwander is further distinguished because the United States exercised exclusive jurisdiction over the lands therein (a dam), which had been purchased by contract between the United States and a third party for a particular purpose. Such a purchase, of course, gives the United States exclusive legislative jurisdiction over the land purchased. The lands which are the subject of the Act herein have not been condemned, withdrawn, or purchased for a particular use. *United States* v. *State Tax Commission of Mississippi*, 412 U.S. 363 (1973); 40 U.S.C. §255.[2]

---

2. 40 U.S.C. §225 provides in relevant part:

Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but . . . the government may, in such cases and at such times as (it) may deem desirable, accept or secure from the State in which any lands

(Continued on following page)

There are, generally, two broad categories of federal lands: 1) The original federal public domain that has not been reserved, condemned or withdrawn for particular uses; and, 2) Those specific areas of federal land where the United States enjoys exclusive jurisdiction, because of complete cession by the State to the United States, or by withdrawal, reservation or condemnation (purchase) of the parcel by the United States for particular uses. *Newhall* v. *Sanger*, 92 U.S. 761 (1875); *United States* v. *Kipp*, 369 F. Supp. 774 (D. Mont. 1974); *United States* v. *State Tax Commission of Mississippi, supra*; 40 U.S.C. §255, *supra*; *State of Nebraska* v. *State of Wyoming*, 325 U.S. 589 (1945); Held, *Whose Public Lands?*, 7 Natural Resources Journal 153 (1967); Hagenstein, *One Third of the Nation's Land*, 12 Natural Resources Journal 56 (1972); *Federal Power Commission* v. *State of Oregon*, 349 U.S. 435 (1955); The Pickett Act, 36 Stat. 847, 43 U.S.C. §141 (withdrawal and reservation of lands by the President).

A withdrawal or reservation of lands by a competent authority for a lawful purpose operates to sever such lands from the public domain. *Kansas Pac. Ry. Co.* v. *Atchison, T. & S.F. R. Co.*, 13 F. 106 (C.C.A. Kan. 1881), *reversed on other grounds*, 112 U.S. 414 (1884); see also, *Wilcox* v. *Jackson*, 38 U.S. 418 (1839); *United States* v. *Chicago*, 48

Footnote Continued—

or interests therein under (its) immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as (it) may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the governor of such state or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be *conclusively presumed that no such jurisdiction has been accepted* (Emphasis added).

U.S. 185 (1849); *United States* v. *Alaska*, 423 F.2d 764 (9th Cir. 1970), *cert. den.* 400 U.S. 967 (1971).

The courts and Congress have consistently recognized the existence of these two types of federal lands, and the great difference in federal jurisdiction which exists between the two categories. There are remaining approximately 470 million acres of the original Federal public domain that have not been reserved, withdrawn, or condemned for particular uses.[3] The Wild Free-Roaming Horses and Burros Act applies to all Bureau of Land Management and Forest Service lands, and no withdrawal, condemnation or reservation of any land is made by the Act. The lands, therefore, remain a part of the public domain, subject to sale or disposal under general laws; the lands have not been reduced from general use, entry and acquisition. *Newhall* v. *Sanger, supra; United States* v. *Kipp, supra*. The purposes of the Act could have been, and can yet be, constitutionally satisfied by withdrawal and reservation of specific parcels of land for wild burro and horse sanctuaries and refuges.

Parts of the vast public domain have been reduced from general use, sale or disposal, entry and acquisition by specific withdrawals of reservations, parks, monuments, sanctuaries, refuges, special uses for Indians, and military needs. It is settled that Congress has authority, under the Property Clause, to make such withdrawals and reservations.

In *United States* v. *Kipp, supra*, the court discussed this distinction, citing *Webster's Third New International Dictionary 1836* (1966) and defining "public land" as:

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3. Hagenstein, *One Third of the Nation's Land*, 12 Natural Resources Journal 56, at 59 (1972).

> . . . land owned by a government, especially a national government; specifically: that part of the United States public domain subject to sale or disposition under the Homestead laws.

The Court concluded by stating, *supra*, at 775-776: ". . . and were the problem merely one of statutory construction, it is quite clear that lands in Glacier Park would be held not to be public lands of the United States." See also, *Oklahoma* v. *Texas*, 258 U.S. 574 (1922).

Appellant, at page 9 of its Statement, discusses other federal acts which "must fall" should this Court affirm the decision below. The statement is incorrect as to each act cited by Appellant. The statutes cited either contain express language maintaining the traditional powers of the States over wild animals upon the federal lands which are the subject of the statutes, or the statutes are otherwise distinguished from the Act herein.[4]

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4. The fears expressed by Appellant at footnote 4, page 9 of its Jurisdictional Statement are unfounded. 16 U.S.C. §671-697a and 16 U.S.C. §26, 98-99 are constitutionally sound, even should this Court affirm the court below. Congress provided for withdrawal or reservation of these lands for sanctuaries and refuges, and for wildlife protection in the national parks (e.g., 16 U.S.C., §1-3; 16 U.S.C. §201, 221.)

Appellant also cites 16 U.S.C. §668dd-668ee, the National Wildlife Refuge System Act of 1966, which provides, in part:

> The provisions of this Act shall not be construed as affecting the authority, jurisdiction, or responsibility of the several states to manage, control, or regulate fish and resident wildlife under state law or regulations in any area within the system.

And 16 U.S.C. §1271, *et seq.*, the Wild and Scenic Rivers Act, provides, at §1284(a):

> Nothing in this chapter shall affect the jurisdiction or responsibilities of the States with respect to fish and wildlife.

And 16 U.S.C. (Supp. III) §1531 *et seq.*, the Endangered Species Act of 1973, provides, at §1533(d):

(Continued on following page)

These statutes amply illustrate that Congress has meticulously observed the traditional constitutional and common law powers and rights of the States with regard to resident wild animals, mindful of the decisions of this Court with regard thereto; that is, until Congress enacted the Wild Free-Roaming Horses and Burros Act, which contains none of the constitutional underpinnings of the foregoing statutes.

On the other hand, should the Wild Free-Roaming Horses and Burros Act be sustained herein, Congress will be free to nullify the conservation, fish and game, and estray laws of the respective States, causing irreparable injury to the States and their citizens and infringing on

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Footnote Continued—

> The Secretary may by regulation prohibit with respect to any threatened species . . . except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to §1535(a) of this title *only to the extent that such regulations have also been adopted by such State* (Emphasis added).

And finally, Appellant cites the Fur Seal Act of 1966, 16 U.S.C. §1151 *et seq.* and the Marine Mammal Protection Act of 1972, 16 U.S.C. (Supp. III) §1361 *et seq.*, which are constitutionally sound, and distinguishable from the Wild Free-Roaming Horses and Burros Act. Within the statutes themselves, Congress expressly finds that the subject animals or their products *move in interstate commerce.*

The United States has obtained exclusive jurisdiction in other specific examples of parks or refuges, because of an express cession of jurisdiction over the land by the State to the United States. For example, Yellowstone National Park, Act Admitting State of Wyoming into the Union, July 10, 1890, 26 Stat. 222 and 1891 Mont. Laws 262, February 14, 1891; *Yellowstone Park Transp. Co.* v. *Gallatin County*, 31 F.2d 644 (9th Cir. 1929), *cert. den.* 280 U.S. 555 (1929); Mount Rainier National Park, 1901 Session Washington Laws 192; *Rainier Nat. Park Co.* v. *Martin*, 23 F. Supp. 60 (W.D. Wash. 1938), *aff'd* 302 U.S. 661 (1938); Mesa Verde National Park, Act of the Legislature of Colorado, approved May 2, 1927, see 16 U.S.C. §117; Pisgah National Game Preserve, 1915 North Carolina Laws 205, N.C.C.A. (1939); *Chalk* v. *United States*, 114 F.2d 207 (4th Cir. 1940), *cert. den.* 312 U.S. 679 (1941).

the sovereignty of the States as attested to by the Tenth Amendment of the Constitution. In the western states, where the proportion of federal lands is substantial (e.g., Nevada—87%; Alaska—96%; New Mexico—34%),[5] this would effectively put to rest the traditional concept of state regulation, control and trustee powers over resident wild animals. Zealous regard and due recognition of the powers belonging to the States must be had if we are to maintain the balance of the federal-state system as contemplated by the Constitution. *Milk Wagon Drivers Union of Chicago* v. *Meadowmoor Dairies*, 312 U.S. 287 (1941).

At pp. 10-11 of its Statement, Appellant quotes statements apparently made by those proposing the Wild Free-Roaming Horses and Burros Act, from Senate and House Committee Reports, alleging that these Committee Reports sustain the Act as based upon the Commerce Clause. However, interstate commerce is not mentioned by the statements set forth by Appellant, nor was any such "finding" of interstate commerce made. Nor does the legislative history discussed by Appellant find or state that there is any *effect* upon interstate commerce. The Act itself contains no finding or language concerning interstate commerce or any effect thereon (as do the Fur Seal Act and the Marine Mammal Protection Act, discussed by Appellant at p. 9 of its Statement).

There is no evidence before this Court that these animals, or any activities relating thereto, affect or are a part of interstate commerce. As found by the court below (Memorandum Opinion, page 6), "No evidence was presented to support this theory; in fact, all the evidence

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5. General Services Administration, Washington, D.C., *Inventory Report on Real Property Owned by the United States throughout the World, as of June 30, 1967*, Table 4, p. 46.

establishes that the wild burros in question here do not migrate across state lines. Further, the Congress made no findings to indicate that it was in any way relying on the Commerce Clause in enacting this statute. This argument must fail." Congress in this Act obviously did not declare or find any connection with, or effect upon, interstate commerce because such does not exist.

The Act itself is clear and unequivocal on its face, relying solely upon the powers of the United States with regard to public lands. Resort to legislative history is, therefore, unnecessary since the statute is not ambiguous. *United States* v. *Oregon*, 366 U.S. 643 (1961). The quotations from the Committee Reports set forth by Appellant, irrelevant because failing to mention interstate commerce, should be disregarded by this Court for this additional ground. Legislative history, where contradictory or ambiguous, should not be permitted to control the clear and customary meaning of the words used in the statute itself. *N.L.R.B.* v. *Plasterers' Local Union No. 79*, 404 U.S. 116 (1971). In the absence of ambiguity the literal language of the Act controls, and Appellant's misplaced reliance on the legislative history is not only unnecessary but improper. *Elm City Broadcasting Corp.* v. *United States*, 235 F.2d 811 (D.C. Cir. 1956); *Haskell* v. *United States*, 241 F.2d 790 (10th Cir. 1957), *cert. den.* 354 U.S. 921 (1957); *Tampa Electric Company* v. *Nashville Coal Co.*, 276 F.2d 766 (6th Cir. 1960), *reversed on other grounds*, 365 U.S. 320 (1961).

II.

Whether the Act intrudes upon the sovereignty and legislative authority of the State as attested to by the Tenth Amendment, and undermines the traditional concepts of State powers over resident wild animals.

This Court, in *South Carolina* v. *United States*, 199 U.S. 437 (1905), which concerned the right of the State to collect an excise tax from liquor sellers, stated that, as a general proposition:

> There are certain matters over which the national government has absolute control and no action of the State can interfere therewith, and there are others in which the state is supreme, and in respect to them the national government is powerless. To preserve the even balance between these two governments, and hold each in its separate sphere, is the peculiar duty of all of the courts . . . 199 U.S. at 448.

Appellees submit that the subject of the Wild Free-Roaming Horses and Burros Act is among those matters "in which the States are supreme." As stated in *Geer* v. *Connecticut*, 161 U.S. 519 (1896), "The wild game within a state belongs to the people in their collective sovereign capacity." 161 U.S. at 529.

Other excerpts from opinions of this Court establish the Appellees' position with regard to the subject animals:

> The wild animals within its borders are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all of its people. Because of such ownership, and in the exercise of its police power, the state may regulate and control the taking, subsequent use and property rights that

may be acquired therein. *Lacoste* v. *Department of Conservation*, 263 U.S. 545 at 549 (1924).

The adjudicated cases recognizing the right of the States to control and regulate the common property in game are numerous. *Geer* v. *State of Connecticut*, 161 U.S. 519 at 528 (1896).

For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. *McCready* v. *Virginia*, 94 U.S. 391, at 394 (1865).

More recently, in *Toomer* v. *Witsell*, 334 U.S. 385 (1948), the Court reaffirmed the continuing vitality of *Geer* and *McCready*, and described the foundation of the States' powers with regard to their wild animals as follows:

> The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the *importance to its people that a state have power to preserve and regulate* the exploitation of an important resource. 334 U.S. at 402 (Emphasis added).

Counsel for Appellant, in trial briefs below, read this Court's decision in *Toomer* as laying to rest the doctrine of State powers over wild animals. Appellees submit that this Court in *Toomer* did not inter the doctrine of State control and power over wild animals, but rather, reaffirmed the doctrine. The Court simply stated that the State's powers arise from *trustee* ownership, and not *technical* ownership, in the true sense of the word. In the exercise of these powers, the States may regulate and control the taking, subsequent use and property rights in resident wild animals, and exercise any and all authority that true, technical ownership ordinarily confers. *Geer*, *Toomer*, *Lacoste*.

In a concurring opinion in *Toomer*, Justice Frankfurter for himself and Justice Jackson emphasized the need to read the Privileges and Immunities Clause (at issue in *Toomer*) in connection with the Tenth Amendment which "presupposes the continued retention by the State of powers that historically belonged to the States and which were not explicitly given to the central government or withdrawn from the States". 334 U.S. at 408. Referring to the Privileges and Immunities Clause, Justice Frankfurter stated:

> This clause does not touch the right of a State to conserve or utilize its resources on behalf of its own citizens, provided it uses these resources within the State and does not attempt a control of the resources as part of a regulation of commerce between the States. A State may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers. 334 U.S. at 408 (concurring opinion).

There is no evidence of any attempt by the State herein to control the wild animals as a part of a regulation of commerce between the States, nor is such alleged.

The rationale set forth in *Lacoste*, *Geer*, *McCready*, and *Toomer* has been frequently reiterated by the courts:

Hunt v. *United States*, 278 U.S. 96 (1928);

Foster-Fountain Packing Co. v. *Haydel*, 278 U.S. 1 (1928);

Ward v. *Race Horse*, 163 U.S. 504 (1896);

Silz v. *Hesterberg*, 211 U.S. 31 (1908);

Patsone v. *Pennsylvania*, 232 U.S. 138 (1914);

Carey v. *South Dakota*, 250 U.S. 118 (1919);

State of Maine v. *Tamano*, 357 F. Supp. 1097 (D. Me. 1973);

State of Maryland v. *Amerada Hess Corp.*, 350 F. Supp. 1060 (D. Md. 1972);

Arkansas State Game and Fish Commission v. *W. R. Wrape Stave Co.*, 76 F. Supp. 323 (E.D. Ark. 1948);

United States v. *Plott*, 345 F. Supp. 1229 (S.D. N.Y. 1972);

A. E. Nettleton Co. v. *Diamond*, 264 N.E.2d 118 (N.Y. 1970);

Barrett v. *State of New York*, 116 N.E. 99 (N.Y. Ct. App. 1917);

New Mexico State Game Commission v. *Udall*, 410 F.2d 1197 (10th Cir. 1969), *cert. den.*, 396 U.S. 961 (1969).

At the same time it is likewise settled that State authority over wild animals must be exercised within the confines of applicable constitutional limitations. As indicated above, State law yields where in conflict with a treaty made under the authority of the United States treaty powers, *Missouri* v. *Holland, supra*; and, a State may not discriminate without reason against citizens of other States in violation of the Privileges and Immunities Clause, *Toomer* v. *Witsell, supra*. Neither of these limitations is herein at issue, nor is such argument made by Appellant. The federal power to destroy wild animals which are damaging federal lands is inapplicable, as discussed above.

The opinion of the District Court in *United States* v. *Plott, supra*, is especially pertinent to the attempt of the Wild Free-Roaming Horses and Burros Act to "transmute" animals into federal property:

> . . . for it is clear that the States in question here do own wildlife and game within the meaning of §2314. The *Geer* rule, which is still the federal law, far from holding that the State does not own wild animals, clearly specifies that it does. Not as a proprietor, but in its sovereign capacity, as the representative and for the benefit of all its people in common. Thus, *Geer* regards a State's relationship to wild animals as an owner in trust, and taking from an owner in trust constitutes stealing or converting within the meaning of §2314 just as much as taking from any other owner. 345 F. Supp. at 1232.

In addition to these powers arising from the authority of an owner in trust, State legislative authority over the subject animals is derived from its police power. Thus, as stated in *Geer*, "Aside from the authority of the State, derived from the common ownership of game and the trust for the benefit of its people which the State exercises in relation thereto, there is another view of the power of the State in regard to the property in game, *which is equally conclusive*. The right to preserve game flows from the undoubted existence in the State of a police power to that end . . ." 161 U.S. at 534 (Emphasis added).

It is clear that the legislative authority and police power of the State extends over federally owned lands within the State, to the same extent as over similar property held by private owners. *Wilson* v. *Cook*, 327 U.S. 474 (1946).

The uncontradicted evidence below establishes that the subject animals: 1) Proliferate rapidly; 2) Cannot peacefully coexist upon the same lands with domestic livestock; 3) Attack and often injure domestic livestock; and 4) Consume feed supplement which is purchased and placed

on private, state and federal permit lands by domestic livestock operators (Tr. 8-9; 41-42; 44; 55-56). Appellees submit that this Court may take judicial notice of the fact that the subject animals, as any animal, are subject to contracting and spreading contagious or infectious diseases.

Appellee, New Mexico Livestock Board, was created to promote greater economy, service, and efficiency in the livestock industry of New Mexico, and to protect the industry from theft and contagious or infectious diseases among animals. 47-23-1 and 47-23-6 N.M.S.A. (1973 Pocket Supp.), *supra*, at p. 2. The State of New Mexico, and the New Mexico Livestock Board, under the State's estray laws and by authority of the United States Constitution, have the responsibility and the right to exercise the State's inherent police power to regulate and control the subject animals so as to prevent the above damages caused by these animals. The State must have the authority to prevent the spread of contagious or infectious disease among its bovine animals, and further, to protect the life, health, welfare and property of the citizens of this State. See, *Clason* v. *State of Indiana*, 306 U.S. 439 (1939), upholding an Indiana statute regulating the transportation and disposal of carcasses of large animals not slaughtered for human food. The Wild Free-Roaming Horses and Burros Act contains no provision for compensation of the citizens of this State for the damages caused by the foregoing activities of these animals, nor does the Act seek to prevent, or in any way regulate, the spread of contagious or infectious diseases by or among the subject animals.

Appellees submit that should this Court uphold the Act, Congress will be free to claim possession of, regulate, control or destroy any wild animals which at any time may touch upon the public domain. In the predominantly federal-land western States, all State statutes and regulations

concerning such animals (e.g., fish and game, estrays, hunting, nonresident licensing, etc.) will be virtually abrogated. Such a result would completely undermine the sovereignty and the traditional rights of the States and their citizens, and would deal a severe blow to the economies of the respective States.

This Court, mindful of the force of the Tenth Amendment and the place of the States in our constitutional system, has resolved close cases in favor of a continuing power on the part of the States to legislate in their customary fields. *South Carolina* v. *United States*, *supra*; *Federal Compress and Warehouse Co.* v. *McLean*, 291 U.S. 17 (1934); *Townsend* v. *Yeomans*, 301 U.S. 441 (1937); *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261 (1943); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970). Appellants' exaggerated view of federal authority and power under the Property Clause, if carried to its logical conclusion, would blot out all State power and legislative authority with regard to public lands within the States. For example, Nevada (87% federal lands) and Alaska (96% federal lands) will become federal property, and Congress will become the State legislature as regards that portion of a State which is public domain. As expressed by Justice White in *Ward* v. *Race Horse*, *supra*, at 514, "(those States) would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner . . . would be exempt in this regard from the authority of the State. (The State) then, will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other States of the Union, a power resulting from the fact of Statehood and incident to its plenary existence."

CONCLUSION

The decision of the three-judge court should be affirmed, or in the alternative, this appeal should be dismissed.

Because the western States are so substantially affected by the subject Act, the Appellees respectfully request this Court to give due consideration to the *amicus curiae* briefs filed herein by Idaho, Nevada, and by the Pacific Legal Foundation of California.

Should this Court decide to reverse the court below, Appellees respectfully request the Court to remand this cause to the three-judge court for determination of Appellees' Second Cause of Action, which was not reached by the court below because of the court's ruling on the First Cause of Action.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1974

No. 74-1488

ROGERS C. B. MORTON,
Appellant,

vs.

STATE OF NEW MEXICO,
Appellee.

On Appeal from the United States District Court for the District of New Mexico

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEE'S MOTION FOR DISMISSAL OR AFFIRMANCE

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Subject Index

Page

Interest of amicus 1

Opinion below 4

Argument 5

I

The Constitution grants Congress no powers which authorize the Act 5

II

Wild and free-roaming horses and burros are not property within the purview of Article IV, Section 3, of the Constitution 8

III

The Commerce Clause does not empower Congress to regulate wild horses and burros 11

Conclusion 12

Table of Authorities Cited

Cases

	Pages
Afroyim v. Rusk, 387 U.S. 253 (1967)	5
Camfield v. United States, 167 U.S. 518 (1896)	9
Geer v. State of Connecticut, 161 U.S. 519 (1895)	10
Hunt v. United States, 278 U.S. 96 (1923)	9
LaCoste v. Dept. of Conservation, 263 U.S. 545 (1923)	10
Missouri v. Holland, 252 U.S. 416 (1919)	9
New Mexico State Game Commission v. Udall, 410 F.2d 1197 (10th Cir. 1969), cert. denied 396 U.S. 961	9
Toomer v. Witsell, 334 U.S. 385 (1947)	10
Ward v. Race Horse, 163 U.S. 504 (1895)	10

Constitutions

United States Constitution:	
Article IV, Section 3	8, 10
Article IV, Section 3, Clause 2	4

Rules

Supreme Court Rules:	
Rule 16	2
Rule 42	1

Statutes

16 United States Code:	
Section 26	6
Section 41	6
Sections 98-99	6
Section 668dd(c)	6
Sections 668dd-668ee (National Wildlife Refuge System Act of 1966)	6
Sections 671-697(a)	6
Section 1151, et seq. (Fur Seal Act of 1966)	6

	Pages
Section 1159(a)	7
Section 1271, et seq. (Wild and Scenic Rivers Act)	7
Section 1273	7
Section 1331	11
Sections 1331-1340, 85 Stat. 649-651 (Wild and Free-roaming Horses and Burros Act, 1971)	2, 5, 8
Section 1334	8, 9
Section 1361, et seq. (Marine Mammal Protection Act of 1972)	7
Section 1361(5)(A) and (B)	7
Section 1531, et seq. (Endangered Species Act)	7
Section 1531(b)	7
Section 1531(f)	7
Section 1531(5)	7
Section 1533(d)	7
Section 1534	7
Section 1535	7

Texts

Effects of Livestock Grazing on Wildlife, Watershed, Recreation and Other Resource Values in Nevada, U.S. Department of Interior, Bureau of Land Management, Feb. 1975	3
2 U.S. Cong. & Admin. News, 2150 (1971)	3
Webster's New Instructional Dictionary of the English Language (2d ed. 1954)	9

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BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEE'S MOTION FOR DISMISSAL OR AFFIRMANCE

INTEREST OF AMICUS

This brief *amicus curiae* on behalf of Pacific Legal Foundation (hereinafter PLF) is respectfully submitted pursuant to Supreme Court Rule 42, consent to the filing of this brief having been granted by counsel for appellant Secretary of the Interior (hereinafter Secretary) and by counsel for appellee State of

New Mexico (hereinafter New Mexico). PLF believes that for the reasons stated herein, this Court should affirm the judgment of the United States District Court for the District of New Mexico or, alternatively, dismiss the Secretary's appeal, pursuant to Supreme Court Rule 16.

PLF is a nonprofit corporation duly organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is set by a Board of Trustees composed of concerned citizens. Ten of the 18-member Board are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where PLF's position has broad public support within the general community.

PLF has members, supporters, and contributors whose lands are being severely damaged by overgrazing from wild and free-roaming horses and burros. PLF is gravely concerned about the damage occurring to the public lands from unregulated overpopulations of wild and free-roaming horses and burros, as well as the damage occurring to these animals themselves. By granting these animals blanket protection without regulation and management, severe overgrazing is occurring on both public and private lands where these unrestrained animals roam at will.

At the time the Wild and Free-roaming Horses and Burros Act, 85 Stat. 649-651, 16 U.S.C. § 1331-1340 (hereinafter Act), was enacted (1971), it was estimated that there were no more than 9500 wild horses

in existence. 2 U.S. Cong. & Admin. News, at 2150 (1971). However, the Secretary has admitted, in his report entitled "Effects of Livestock Grazing on Wildlife, Watershed, Recreation and Other Resource Values in Nevada," U.S. Department of Interior, Bureau of Land Management, February, 1975, (hereinafter Nevada Report), that horse populations are multiplying at the rate of 20 percent per year. *Id.* at 36. Thus, the Secretary is now able to claim that today—after four years of fruitful propagation—there are 20,000 to 25,000 wild horses in Nevada alone. *Id.* at 35-36. The havoc wild horses and burros are causing and will continue to wreak upon the western rangelands is disastrous.

Severe competition for forage and water exists between wild horses and burros on the one hand and domestic livestock and game species on the other. If permitted to continue unchecked, populations of wild horses and burros will destroy rangeland habitat for themselves, as well as for domestic and game animals. This destruction of habitat will cause widespread adverse economic consequences in the cattle industry and to the consumers of meat products. Numbers of livestock will be reduced, raising prices of meat products. Beef imports will have to be increased, aggravating our balance of payments problem and dependence on other countries. The high price of beef will force consumers to purchase substitute foods, not as rich in essential proteins.

The livestock industry is a basic part of the economic structure of the western states and its impor-

tance to this nation's stability—particularly during the present uncertain economic picture—cannot be overemphasized. The potential for severe national economic disruption through the multiplier effect is real and imminent.

More important than the economic issues, however, is the issue of the limitation of federal regulation to matters enumerated in the Constitution.

Because the Secretary has failed to show any constitutional basis for the Act, either in the district court or in his jurisdictional statement, his appeal is devoid of merit and should be dismissed and the judgment of the district court should be summarily affirmed.

OPINION BELOW

The three-judge United States District Court for the District of New Mexico (appearing in appellant's appendix) declared the Act to be unconstitutional. Specifically, the district court held that wild and free-roaming horses and burros were not property over which the federal government could exercise dominion and control under article 4, section 3, clause 2, of the United States Constitution; rather, that sovereign ownership was vested in the individual states. Additionally, the court held that since wild and free-roaming horses and burros are not migratory animals, Congress could not find a power to regulate such animals under the commerce clause of the United States Constitution.

ARGUMENT

I

THE CONSTITUTION GRANTS CONGRESS NO POWERS WHICH AUTHORIZE THE ACT

The basic issue in this case is whether Congress acted within the powers delegated to it under the Constitution in adopting the Wild Free-roaming Horses and Burros Act, 16 U.S.C.A. § 1331-1340 (hereinafter Act).

In *Afroyim v. Rusk,* 387 U.S. 253, 257 (1967), this Court delineated the limits of congressional power:

> "Our Constitution governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones. . . ."

Thus, in order for an act to be valid, it must be grounded on a specifically enumerated power. In the Act's statement of purpose, Congress neglected to identify the specific section of the Constitution relied upon, apparently preferring to emphasize emotional, rather than legal, aspects of the issue. This theme has been carried over into the Secretary's Jurisdictional Statement.

The Secretary contends (Jurisdictional Statement, at 9, n. 4) that the operative effect of holding the Act unconstitutional would be to make several cited federal wildlife statutes also unconstitutional. A brief reference to the cited statutes reveals that the Secretary's claim is without merit and fails to distinguish

the authority and manner of regulation of those statutes with the Act.

The National Wildlife Refuge System Act of 1966 (16 U.S.C. § 668dd-668ee) sets aside specific federal property as a habitat for wildlife. While hunting is prohibited within those areas unless allowed by law, Congress specifically recognized State authority:

> "[N]othing in this Act shall be construed to authorize the Secretary to control or regulate hunting or fishing of resident fish and wildlife on lands not within the system. The regulations permitting hunting and fishing of resident fish and wildlife within the System shall be, to the extent practicable, consistent with State fish and wildlife laws and regulations. *The provisions of this Act shall not be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System.*" 16 U.S.C. § 668dd(c). (Emphasis added.)

Several of the cited acts establish specific wildlife sanctuaries or prohibit hunting of specified animals within certain parts of the United States. 16 U.S.C. § 671-697(a); 16 U.S.C. § 26 and 98-99; and 16 U.S.C. § 41. However, unlike the Act, these statutes merely proscribe *activities* upon federal lands, much as any private landowner may regulate activities of others on his land.

The Fur Seal Act of 1966 (16 U.S.C. § 1151, *et seq.*) was enacted pursuant to a treaty—the Interim Convention on the Conservation of North Pacific Fur

Seals. 16 U.S.C. § 1159(a). Authority is also found under congressional power over foreign commerce since the seals are primarily taken in international waters and imported into the United States.

The Marine Mammal Protection Act of 1972 (16 U.S.C. § 1361 *et seq.*) contains specific findings that the animals sought to be protected move in interstate commerce or affect animals which also move in interstate commerce. 16 U.S.C. § 1361(5) (A) and (B). Congress further found that such protection is necessary to insure their continuing availability for commerce.

The Endangered Species Act (16 U.S.C. § 1531 *et seq.*) is specifically enacted pursuant to the treaty power. 16 U.S.C. § 1531(f). Additionally, there are numerous provisions therein which recognize the state's right to manage its wildlife and which often defer to the state. *See, e.g.,* 16 U.S.C. § 1533(d), 1535. It is also noted that the acquisition of land to provide suitable habitats for endangered species (16 U.S.C. § 1531(b) and 1534) and the power of the purse (16 U.S.C. § 1531(5)) were chosen as the primary means of achieving Congress's goals.

The Wild and Scenic Rivers Act (16 U.S.C. § 1271 *et seq.*) protects designated rivers as a complement to the national policy of constructing dams. 16 U.S.C. § 1271. Thus, there is authority under the Commerce Clause, since water control projects affect interstate commerce. Moreover, under this Act, the states, not the federal government, administer the program without expense to the federal government. 16 U.S.C. § 1273.

The Wild Free-roaming Horses and Burros Act, in contradistinction to the above statutes, purports to extend federal control over all wild horses and burros, not only on federal lands but even on private lands. 16 U.S.C.A. § 1334. Such animals are non-migratory in nature. Congress did not attempt to recognize any state authority over these animals, but rather assumed plenary power of regulation without citation to any applicable constitutional provision. Congress failed to cite any applicable treaty and failed to note any applicability of the Commerce Clause. Thus, contrary to the Secretary's fears, finding the Act to be unconstitutional because it is not grounded in an enumerated power will not affect the constitutionality of the cited statutes because those statutes are based on enumerated powers.

II

WILD AND FREE-ROAMING HORSES AND BURROS ARE NOT PROPERTY WITHIN THE PURVIEW OF ARTICLE IV, SECTION 3, OF THE CONSTITUTION

The Secretary takes the position that federal authority to control wild free-roaming horses and burros, wherever they may be found, is in part based on the Property Clause of Article IV, Section 3 of the Constitution:

> "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . "

This position ignores the language of the Act, 16 U.S.C.A. § 1334, which purports to control wild horses and burros which are not on federal land. This position also falters in making the bootstrap assumption that the animals are in the constitutional terminology, "other property belonging to the United States."

Property is simply that over which someone exercises dominion and control to the exclusion of others. Webster's New Instructional Dictionary of the English Language (2d ed. 1954). Wild animals (*ferae naturae*), however, have historically been viewed as the antithesis of property; they are "wild" because no dominion and control is exercised over them. Thus, "[w]ild birds [and presumably horses and burros] are not in the possession of anyone; and possession is the beginning of ownership." *Missouri v. Holland,* 252 U.S. 416, 434 (1919).

Thus, it is not surprising that the Secretary, in *New Mexico State Game Commission v. Udall,* 410 F.2d 1197, 1200 (10th Cir. 1969), *cert. denied* 396 U.S. 961, did "not assert that the United States has any ownership in wild animals within the various states." He did not because he could not.

Each state has plenary power to regulate wild animals within their boundaries subject only to the limitation that the federal government may take any action to protect public lands from such animals. *Camfield v. United States,* 167 U.S. 518 (1896); *Hunt v. United States,* 278 U.S. 96 (1923).

Regulation of wild animals is, in the absence of a treaty or other constitutionally authorized exception,

solely a function of the individual states, into whose charge such animals are entrusted for the benefit of all the people in common. This Court has noted:

> "'We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor but in its sovereign capacity, as the representative and for the benefit of all its people in common.'" *Geer v. State of Connecticut,* 161 U.S. 519, 529 (1895).

Cf. Ward v. Race Horse, 163 U.S. 504, 507 (1895); *LaCoste v. Dept. of Conservation,* 263 U.S. 545, 549 (1923).

Use of the term "ownership" in this sense is a legal fiction—*i.e.,* a term of art for the purpose of defining the fiduciary duty vested in each state to regulate wild animals for the benefit of all the people. *Toomer v. Witsell,* 334 U.S. 385, 402 (1947). It derives from common law whereby the power over such animals vested in the states as colonies and there resides to this day. *Geer v. State of Connecticut, supra* at 528.

Since the federal government has no property interest in wild animals, it necessarily follows that the district court properly found the Property Clause to be inapplicable.

III

THE COMMERCE CLAUSE DOES NOT EMPOWER CONGRESS TO REGULATE WILD HORSES AND BURROS

The Secretary's brief allusion to the Commerce Clause in his Jurisdictional Statement at 10 is wholly inadequate. Having failed to develop a minimal record in the district court, the Secretary is now attempting to present this Court with a belated record. Despite the Secretary's brief statements to the contrary, it is impossible to find within the Act a finding by Congress that it relied upon the Commerce Clause.

The avowed purpose of the Act is the protection of wild horses and burros, and the means chosen to accomplish this was to characterize such animals as an integral part of public lands. 16 U.S.C. § 1331. Not only is there no indication in the Act of any reliance upon the commerce powers, the district court noted that no evidence was presented to the court to support this theory. Memorandum opinion at 6. Indeed, the district court specifically held that "all the evidence established that the wild burros in question here do not migrate across state lines. Since Congress demonstrated no intent to utilize its commerce powers to regulate non-migratory wild animals, the district court correctly found the Secretary's reliance upon the Commerce Clause to be inappropriate.

CONCLUSION

The Secretary has failed to show any constitutional authority for the Act. Therefore, Pacific Legal Foundation, as *amicus curiae,* urges that the appeal be dismissed or that the decision of the district court be summarily affirmed.

August 12, 1975.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74–1488

ROGERS C. B. MORTON,
SECRETARY OF INTERIOR,
Appellant,

v.

STATE OF NEW MEXICO, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

BRIEF OF AMICI CURIAE NEVADA STATE BOARD OF AGRICULTURE CENTRAL COMMITTEE OF NEVADA STATE GRAZING BOARDS

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Constitutional Provisions and Statutes Involved	2
Consent	2
Interest of Amici Curiae	3
Statement of the Case	5
Question Presented	5
Introduction and Summary	5
Argument	6
Conclusion	12
Appendix "A"	14
Appendix "B"	14

CITATIONS

Cases:

	PAGE
Alabama v. Texas, 347 U.S. 272 (1954)	7
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)	7
Burgess v. M/V Tamano, 370 F.Supp. 247 (D.C. Maine 1973)	9
Carpenter v. Morton, Civil-R-75-1-BRT (before D.C. Nevada)	4
Chalk v. United States, 114 F.2d 207 (4th Cir. N.C. 1940), *cert. denied* 312 U.S. 679 (1941)	10
Federal Power Commission v. Idaho Power, 344 U.S. 17 (1952)	7
Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928)	9
Geer v. Connecticut, 161 U.S. 519 (1896)	8
Hunt v. Arizona, 278 U.S. 96 (1928)	9

Ivanhoe Irrigation District v. McCracken,
357 U.S. 275 (1958) ..... PAGE 7

Lacoste v. Department of Conservation,
263 U.S. 545 (1924) 7

McCready v. Virginia,
94 U.S. 391 (1865) 8

Maine v. M/V Tamano,
357 F.Supp. 1097 (D.C. Maine 1973) 9

Maryland v. Amerada Hess Corp.,
350 F.Supp. 1060 (D.C. Md. 1972) 9

Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies,
312 U.S. 287 (1941) 12

New Mexico State Game Commission v. Udall,
410 F.2d 1197 (10th Cir. 1969) 9

Newhall v. Sanger,
92 U.S. 761 (1875) 9

Oklahoma v. Texas,
258 U.S. 574 (1922) 10

Rainer Nat. Park Co. v. Martin,
23 F.Supp. 60 (D.C. Wash. 1938), *aff'd*,
302 U.S. 661 (1938) 10

Silz v. Hefterberg,
211 U.S. 31 (1908) 9

Toomer v. Witsell,
334 U.S. 385 (1948) 8

United States v. California,
332 U.S. 19 (1947) 7

United States v. Kipp,
369 F.Supp. 774 (D.C. Mont. 1974) 9

United States v. Plott,
345 F.Supp. 1229 (D.C. N.Y. 1972) 9

United States v. San Francisco,
310 U.S. 16 (1940) 7

Ward v. Race Horse,
163 U.S. 504 (1896) 9, 12

Yellowstone Park Transp. Co. v. Gallatin County,
31 F.2d 644 (9th Cir. 1929), *cert. denied*, PAGE
280 U.S. 555 (1929) 10

Constitution and Statutes:

U.S. Const. Art. I, Section 8 11

U.S. Const. Art. IV, Section 2 8

U.S. Const. Art. IV, Section 3 ..... 2, 7, 9

U.S. Const. Amend. X 2, 7

Endangered Species Act of 1973,
16 U.S.C. (Supp. III) 1531 et seq. 11
16 U.S.C. 1533 (d) 11

Federal Advisory Committee Act,
86 Stat. 770, 5 U.S.C. Appendix I 4

Fur Seal Act of 1966,
16 U.S.C. 1151 et seq. 11
16 U.S.C. 1151 11

Marine Mammal Protection Act of 1972, as amended,
16 U.S.C. (Supp. III) 1361 et seq. 11
16 U.S.C. 1361 (5) 11

National Wildlife Refuge System Act, as amended,
16 U.S.C. 668dd-668ee 11
16 U.S.C. 668dd (c) 11

Nevada's Enabling Act,
13 Stat. 30–32 (1864) 2, 13

Taylor Grazing Act,
43 U.S.C. 315 et seq., 315o-1 4

Wild and Scenic Rivers Act,
16 U.S.C. 1271 et seq. 11
16 U.S.C. 1284 (a) 11

Wild Free-Roaming Horses and Burros Act,
16 U.S.C. (Supp. III) 1331–1340 ..... 2, 6
16 U.S.C. 1332 (b) 6

Wyoming's Enabling Act,
26 Stat. 222 (1890) 10

	PAGE
16 U.S.C. 26	10
16 U.S.C. 98–99	10
16 U.S.C. 117	10
16 U.S.C. 671–697a	10
28 U.S.C. 1252–1253	1
1891 Mont. Laws 262	10
Nevada Revised Statutes:	
N.R.S. 235.070	6
N.R.S. 561.045	3
N.R.S. 561.055	3
N.R.S. 561.105	3
N.R.S. 568.060	4
N.R.S. 568.170	4
N.R.S. Chapter 569	3
N.R.S. Chapter 571	3
1915 North Carolina Laws 205	10
North Carolina Code Ann. (1939) Sec. 2099	10
1901 Washington Session Laws 192	10
General Services Administration Materials:	
Inventory Report on Real Property Owned by the United States Throughout the World, as of June 30, 1967, Table 4, p. 46	4
Miscellaneous:	
Webster's Third New International Dictionary 1836 (1966)	10

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

BRIEF OF AMICI CURIAE NEVADA STATE BOARD OF AGRICULTURE CENTRAL COMMITTEE OF NEVADA STATE GRAZING BOARDS

OPINION BELOW

The opinion of the District Court is not yet reported and appears as Appendix A in the Appellant's Jurisdictional Statement.

JURISDICTION

The jurisdiction of this Court was invoked by the Appellant under 28 U.S.C. 1252 and 1253 and is not questioned by the Amici.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article IV, Section 3, of the United States Constitution (the "Property Clause") provides in part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any Claims of the United States, or of any particular State.

2. Amendment X, of the United States Constitution (the reserved "Police Powers") provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

3. The Wild Free-Roaming Horses and Burros Act, 85 Stat. 649–651, 16 U.S.C. (Supp. III) 1331–1340, enacted December 15, 1971, is reproduced in Appendix F of the Appellant's Jurisdictional Statement.

4. Act of Congress (1864) Enabling the People of Nevada to Form a Constitution and State Government, 13 Stat. 30–32 (1864) provides in part:

> That the inhabitants of that portion of the territory of Nevada included in the boundaries hereinafter designated be, and they are hereby, authorized to form for themselves, out of said territory, a state government, with the name aforesaid, which said state, when formed, shall be admitted into the Union upon an equal footing with the original states, in all respects whatsoever.

CONSENT

The Board of Agriculture being a statutory board of the State of Nevada sponsored by the Attorney General permissibly appears

with the consent of the Appellees pursuant to Rule 42(4) of the Supreme Court Rules; the Central Committee of Nevada State Grazing Boards appears with the consent of the Appellant and Appellees pursuant to Rule 42(1) of the Supreme Court Rules.

INTEREST OF AMICI CURIAE

The State Board of Agriculture (Board of Agriculture) and the Central Committee of Nevada State Grazing Boards (Central Committee) are both statutory boards of the State of Nevada. The Board of Agriculture is created pursuant to Nevada Revised Statutes (N.R.S.) 561.045, with the express duties of keeping informed and advising the Governor and Legislature on agriculture and livestock matters affecting Nevada, and to formulate policy for the State Department of Agriculture, N.R.S. 561.105. Such a public charge includes, as the governing body of the State Department of Agriculture, management and enforcement of Nevada's estray laws, N.R.S. Chapter 569, and diseased animals laws, N.R.S. Chapter 571.[1] The Central Committee, N.R.S. 568.170, as amended in 1975, representing Nevada's livestock industry, has similar interests with emphasis on range improvement and management to allow an important renewable resource of Nevada, namely range forage, to keep contributing to the World's food production cycle.

The Board of Agriculture is made up of members appointed by the Governor, N.R.S. 561.045, all of which are to be actively engaged in agriculture, N.R.S. 561.055.[2]

The membership of the Central Committee is comprised of

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[1]Pertinent parts of N.R.S. Chapters 569 and 571 are set forth in Appendix A.

[2]N.R.S. 561.055 "Three members * * * in range or semirange cattle production, one in dairying, one in general farming and one in the apiary industry."

knowledgeable, actual users of the western range, N.R.S. 568.-170, as amended in 1975, who in turn are chosen from district grazing boards, N.R.S. 568.060, as amended in 1975.[3]

The Board of Agriculture and the Central Committee, having the trust and charge of the people of Nevada on all areas of agriculture, livestock and range management within the state of Nevada, have a deep interest in having the Appellee's position affirmed. At stake is the local control and sovereignty of Nevada in dealing with local problems affecting agriculture and livestock production, a large segment of Nevada's economy, as well as the state's wildlife. Any position less than total affirmation of the Court below would cast serious aspersions on the Amici's authority to continue serving Nevada by carrying out their statutory duties on the vast majority of lands within the State and would deal a damaging blow to the economy of the state. Nevada, being composed of eight-six percent (86%) federally owned land[4] is second only to Alaska in such percentage of federal ownership. Should the Appellant prevail, Nevada's control of estrays would be emasculated, as would its ability to control diseased animals or perform range improvements on the federally owned 86% of Nevada. The United States will have lost a valuable service and Nevada will have at least lost agricultural self-rule.

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[3]The membership qualification procedure prior to the 1975 amendment and the amended statute, N.R.S. 568.060, are set forth in Appendix B. The 1975 amendment provides generality and independence from possible change in the practice and regulations of the Bureau of Land Management. The issue as to continued existence of Grazing District Advisory Boards under the Taylor Grazing Act, 43 U.S.C. Sec. 315o-1 since the passage of the Federal Advisory Committee Act, Pub. L. 92–463, 86 Stat. 770, 5 U.S.C. Appendix I, is presently before the United States District Court, District of Nevada, in *Carpenter v. Morton*, Civil R–75–1–BRT.

[4]Inventory Report on Real Property Owned by the United States Throughout the World, as of June 30, 1967, General Services Administration, Washington, D.C. Table 4, p. 46.

STATEMENT OF THE CASE

The Amici Curiae adopt the Statement of the Case made by the Appellees.

QUESTION PRESENTED

Whether a Three-Judge Federal District Court correctly held the Wild Free-Roaming Horses and Burros Act unconstitutional as exceeding the power of Congress to protect federal lands, and as infringing on the "Police Powers" reserved to the States.

INTRODUCTION AND SUMMARY

The term "Wild Horses" conjures up visions of that gallant steed escaping from the Spanish Conquistadors to roam the prairie. The problem with allowing such romanticism to prevail is that the term has been expanded to cover horses recently wandering from local ranches, or horses recently released to fend for themselves during hard winter months. What truly are "wild horses" today, if there is such a thing, nobody seems to know. Information is sketchy as inventories are usually made by aircraft where branding or other indicia of prior private use cannot be ascertained.

Several facts are certain: 1) Most horses and burros on the western range can be traced to either direct private ownership or recent private control of the animals or their forebearers; 2) In certain areas the horses have proliferated so as to cause serious damage to range lands be they federal, state or private; 3) Range horses within a comparatively short period of time of last domestic control adapt to the wild and become difficult if not impossible to capture or even approach; 4) Indigenous wildlife suffers or even disappears from its native range when horses proliferate and compete for food supplies.

These matters are of concern to the Amici who believe that the

law is clear that the States have the rights and obligations to control of wildlife within their borders as developed in the Common Law and under exercise of their "Police Powers", U.S. Const. Amend. X. It is necessary to proper and orderly management of livestock and agriculture, major contributors to Nevada's economy, as well as wildlife, that local matters be left to local control.

It is ironic that Congress has sought federal protection of "wild horses" when it is the local livestock interests that have introduced them onto the local ranges. Should they ever become endangered the herds could quickly be replenished from the source from which they came—the barnyard, a feat not possible for a truly endangered specie such as the Desert Bighorn[5] whose numbers are dwindling due in part to the domination of their original range by "wild free-roaming horses and burros".

ARGUMENT

THE WILD FREE-ROAMING HORSES AND BURROS ACT IS UNCONSTITUTIONAL, EXCEEDING THE POWER OF CONGRESS TO PROTECT FEDERAL LANDS AND INFRINGING ON THE POLICE POWERS RESERVED TO THE STATES.

It is clear from the face of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. (Supp. III) 1331–1340, that it does not deal with the protection of federal lands. Simply stated the Act protects "unbranded and unclaimed horses and burros", 16 U.S.C. 1332(b). Such definition includes unbranded private horses wandering onto federal lands that cannot be located to be claimed.

The Amici do not doubt, nor do they argue against, the power

[5]Nevada's state animal, N.R.S. 235.070.

of Congress to deal with the classical concepts of real property as associated with federal lands under the "Property Clause", U.S. Const. Art. IV, Section 3. The cases are consistent: *United States v. San Francisco*, 310 U.S. 16 (1940), conditions on disposal of public lands; *United States v. California*, 332 U.S. 19 (1947), offshore property rights; *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17 (1952), conditions on use of public lands; *Alabama v. Texas*, 347 U.S. 272 (1954), disposal of public lands; *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958), use of public lands and federal property.

The Appellant cites *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), for the proposition that Congress's powers under the "Property Clause" extends to "what the land contain(s)". Again, the Amici cannot disagree with the authority cited, only with the appropriateness of its application to the issue —"wild free-roaming horses and burros" (ferae naturae). *Ashwander* dealt specifically with water and water rights on condemned land, a concept long associated as being a real property right. The passage quoted by the Appellants is from a discussion of mineral rights reserved by the United States, rights truly contained in the land and again classically dealt with as real property. It is difficult to visualize "wild free-roaming horses and burros", or other wildlife as being "contained in the land". Such is inconsistent with notions of what is wild and free-roaming.

This Court has long held that the several states are charged with the responsibility and exclusive control of non-migratory wildlife within their external boundaries by Common Law rights and under exercise of their "Police Powers", U.S. Const. Amend. X, *Lacoste v. Department of Conservation*, 263 U.S. 545, 549 (1924):

> The wild animals within its borders are, so far as capable of ownership, *owned by the State in its sovereign capacity*, for

> the common benefit of all people. Because of such ownership, *and in the exercise of its police power, the State may regulate and control the taking, subsequent use and property rights that may be acquired therein.* (emphasis added.) (citations omitted.)

The rationale set forth in *Lacoste* stems from a long pattern of cases recognizing state control of wildlife, *Geer v. Connecticut*, 161 U.S. 519 (1896) and *McCready v. Virginia*, 94 U.S. 391 (1865).

A more recent decision by this Court, *Toomer v. Witsell*, 334 U.S. 385 (1948), reiterated your long standing position. *Toomer* dealt with the discriminatory taxation and licensing ($25 v. $2500) of non-resident shrimp fishermen off the coast of South Carolina. While holding that such a wide divergence of taxation and license fees were a violation of the "Privileges and Immunities Clause", U.S. Const. Art. IV, Section 2, Justice Frankfurter sets forth in his concurring opinion the body of law that had developed, *supra* at 408, 409:

> * * * A State may care for its own [resources] in utilizing the bounties of nature within her borders, because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers.
>
> When the Constitution was ado[illegible]d such, no doubt, was the common understanding regard[illegible] the power of States over its fisheries, and it is this com[illegible]on understanding that was reflected in McCready v. Virginia, 94 U.S. 391. *The McCready case is not an isolated decision to be looked at askance. It is the symbol of one of the weightiest doctrines in our law.* It expressed the momentum of legal history that preceded it, and around it in turn has clustered a voluminous body of rulings. Not only has a host of State cases applied the McCready doctrine as to the power of the States to control their game and fisheries for the benefit of their own citizens * * * (emphasis added).

The above position has never been repudiated with both state and federal decisions so holding being too numerous to be chronicled herein. However, other pertinent decisions of this Court and applicable recent decisions of the lower federal courts are: *Hunt v. Arizona*, 278 U.S. 96 (1928); *Foster-Foundation Packing Co. v. Haydel*, 278 U.S. 1 (1928); *Silz v. Hefterberg*, 211 U.S. 31 (1908); *Ward v. Race Horse*, 163 U.S. 504 (1896); *Burgess v. M/V Tamano*, 370 F.Supp. 247 (D.C. Maine 1973); *Maine v. M/V Tamano*, 357 F.Supp. 1097 (D.C. Maine 1973); *Maryland v. Amerada Hess Corp.*, 350 F.Supp. 1060 (D.C. Md. 1972); *United States v. Plott*, 345 F.Supp. 1229 (D.C. N.Y. 1972); and *New Mexico State Game Commission v. Udall*, 410 F.2d 1197 (10th Cir. 1969).

The Appellants attempted to bolster their plea by raising the specter of all the wildlife protection legislation that must fall if the judgment is affirmed. This "parade of the horribles" just cannot be supported in the law, the constitutional infirmities present in the Wild Free-Roaming Horses and Burros Act being absent in the other legislation.

The Wild Free-Roaming Horses and Burros Act speaks of "public lands of the United States" in the definition of "Wild free-roaming horses and burros" and "public lands of the United States" has come to mean "* * * those lands subject to sale or disposal under general laws (Newhall v. Sanger, 92 U.S. 761, 23 L.Ed. 769 (1875)) * * *", *United States v. Kipp*, 369 F.Supp. 774, 775 (D.C. Mont. 1974).

The vast public domain has been reduced from general use, entry and acquisition by withdrawals of reservations, parks, monuments, refuges and other special uses for Indians, military needs, recreation, and conservation. The law is replete with authority for Congress to act under the "Property Clause", U.S. Const. Article IV, Section 3, in making such withdrawals and reservations. Such land so withdrawn or reserved is no longer "public land of the

United States", instead it becomes a different class of federally owned land. This distinction is so well ingrained in our understanding that District Judge Russell Smith saw fit to set forth a general dictionary definition so noting the distinction.[6] Judge Smith finished his discussion on this point by stating, *supra* at 775, 776: "* * * and were the problem merely one of statutory construction it is quite clear that lands in Glacier Park would be held not to be public lands of the United States." See also: *Oklahoma v. Texas*, 258 U.S. 574 (1922).

With such a withdrawal or reservation of refuge and park lands from the "public lands" the Appellant should not fear for those refuges and wildlife in parks as is provided for in 16 U.S.C. 671–697a, and 16 U.S.C. 26, 98–99. A special level of federal control has attached because of the special use to which the lands are put.

In many instances the park or refuge is doubly protected because of a ceding of state jurisdiction to the federal government: Yellowstone National Park, Act Admitting State of Wyoming into the Union, July 10, 1890, 26 Stat. 222, 1891 Mont. Laws 262, February 14, 1891, *Yellowstone Park Transp. Co. v. Gallatin County*, 31 F.2d 644 (9th Cir. Mont. 1929), *cert. denied* 280 U.S. 555 (1929); Mount Rainer National Park, 1901 Washington Session Laws 192, *Rainer Nat. Park Co. v. Martin*, 23 F.Supp. 60 (D.C. Wash. 1937), *aff'd* 302 U.S. 661 (1938); Mesa Verde National Park, Act of the Legislature of Colorado, approved May 2, 1927, see 16 U.S.C. 117; Pisgah National Game Preserve, 1915 North Carolina Laws 205, N.C. Code Ann. (1939) Sec. 2099, *Chalk v. United States*, 114 F.2d 207 (4th Cir. N.C. 1940) *cert. denied*, 312 U.S. 679 (1941).

[6]Webster's Third New International Dictionary 1836 (1966) defines "public land" as "land owned by a government, esp. a national government; *specif:* that part of the U.S. public domain subject to sale or disposition under the homestead laws."

The other federal acts cited by the Appellant as dangerously in conflict with the lower court's opinion are self-cleansing—they contain either specific language ruling against such confrontation with State fish and game laws, or they are easily distinguished.

The National Wildlife Refuge System Act of 1966, as amended, 16 U.S.C. 668dd-668ee, specifically states, Section 668dd(c):

> The provisions of this Act shall not be construed as affecting the authority, jurisdiction or responsibility of the several States to manage, control or regulate fish and resident wildlife under State law or regulations in any area within the System.

The Wild and Scenic Rivers Act, 16 U.S.C. 1271 et seq. specifically states, Section 1284(a):

> Nothing in this chapter shall affect the jurisdiction or responsibilities of the States with respect to fish and wildlife.

The Endangered Species Act of 1973, 16 U.S.C. (Supp. III) 1531 et seq. specifically states, Section 1533(d):

> The Secretary may by regulation prohibit with respect to any threatened species * * * except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to Section 1535(a) of this title *only to the extent that such regulations have also been adopted by such state.* (emphasis added.)

Both the Fur Seal Act of 1966, 16 U.S.C. 1151 et seq. and the Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. (Supp. III) 1361 et seq. will find continued and prosperous life regardless of the outcome of this appeal: they find their basis in the Commerce powers of the Congress, U.S. Const. Art. I, Section 8. See 16 U.S.C. 1151 where authority over fur seals is vested in the Secretary of Commerce, and 16 U.S.C. 1361(5)

where Congress expressly found in the statute itself, that marine mammals or their products move in interstate commerce.

More deserving of consideration would be the implied reversal of all states' fish and game laws, estray laws and diseased animal laws at least as to "public lands", not to mention a long standing body of law, should the lower court's opinion be overturned. "To maintain the balance of our federal system, insofar as it is committed to our care, demands at once zealous regard for the guarantees of the Bill of Rights and due recognition of the powers belonging to the states," *Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies*, 312 U.S. 287, 297 (1941). Statehood of our "public land states" is at issue as we approach our bicentennial year.

CONCLUSION

The Board of Agriculture and Central Committee believe that Nevada should be able to control estrays, diseased animals, fish and game and promote range management within the boundaries of Nevada. Should these obvious rights under the State's police powers be stripped, state sovereignty is necessarily questioned.

The fears of Nevada (86% federally owned) and New Mexico (34% federally owned) were expressed by Justice White in *Ward v. Race Horse, supra* at 514, in answering an Indian's claim that treaty hunting rights extended to all "public lands" within Wyoming:

> The power of all the states to regulate the killing of game within their borders will not be gainsaid, yet, if the treaty applies to the unoccupied land of the United States in the State of Wyoming [Nevada, New Mexico], that State would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner, so long as it continued to be unoccupied land, would be exempt in this regard from the authority of the State. Wyoming

> [Nevada, New Mexico] then, *will have been admitted into the Union, not as an equal member*, but as one shorn of a legislative power vested in all the other States of the Union, a power resulting from the fact of statehood and incident to its plenary existence. (emphasis added.)

Nevada's Enabling Act, 13 Stat. 30–32 (1864) provides that Nevada "* * * shall be admitted into the Union upon an equal footing with the original states, in all respects whatsoever."

Respectfully submitted,

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State Grazing Boards

August, 1975

APPENDIX "A"

Pertinent parts of N.R.S. Chapters 569 and 571 provide as follows:

569.005 Definitions.

* * *

2. "Estray" means any livestock running at large upon public or private lands in the State of Nevada * * *.

3. "Livestock" means:

* * *

(b) All horses, mules, burros and asses or animals of the equine species;

569.010 Estrays deemed property of state department of agriculture; disposition of moneys collected for sales, injuries or killing.

1. Except as otherwise provided by law, all estrays within the State of Nevada, shall be deemed for the purpose of this section to be property of the department.

571.120 Duties of state dep ment of agriculture. The department shall do all things necessary for the control and eradication of infectious, contagious or parasitic diseases of livestock.

571.240 Inspection of livestock about to be removed from state.

1. Inspectors may inspect any or all livestock about to be shipped, driven, transported or otherwise removed from the state.

APPENDIX "B"

Qualifications for membership to the state grazing boards, prior to the 1975 amendment was:

568.060 State grazing boards: members; chairman; qualifications. The members and the chairman of each of the state grazing boards shall be the members and chairmen of each of the boards of district advisors of each grazing district elected, qualified and serving under the provisions of the Taylor Grazing Act and the regulations promulgated under the provisions of that act, except that membership on such state boards shall be limited to residents of the State of Nevada.

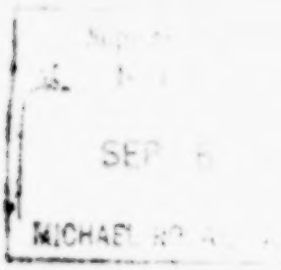
Qualifications for membership subsequent to the 1975 amendment of the Nevada Legislature will be:

568.060 1. The members and the chairman of each of the state grazing boards for the year 1975 shall be the members and chairmen

of each of the boards of district advisors of each grazing district elected, qualified and serving on July 1, 1975, under the provisions of the Taylor Grazing Act and the regulations promulgated under the provisions of that act except that membership on such state boards shall be limited to residents. Such members shall serve until their successors are elected and qualified as provided in this section.

2. On an after January 1, 1976, each state grazing board shall consist of not less than five nor more than twelve stockmen who graze livestock upon the public lands within the grazing district for which such state grazing board is created. Officers and directors of corporations and partners of partnerships which conduct such grazing are qualified to be elected to serve on such boards on behalf of such corporation or partnership. The term of each member is 3 years, beginning on January 1 next after his election.

See Advance Sheets, 1975 Nevada Stats. Chapter 386.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1488

ROGERS C. B. MORTON,
SECRETARY OF INTERIOR

Appellant,

v.

STATE OF NEW MEXICO, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

BRIEF OF AMICUS CURIAE STATE OF IDAHO

WAYNE L. KIDWELL, ATTORNEY GENERAL
WARREN FELTON, DEPUTY ATTORNEY GENERAL

INDEX

PAGE

Jurisdiction 1

Consent 2

Interest of the State of Idaho as Amicus Curiae 2

Argument 2

Conclusion 9

Appendix "A" 10

Appendix "B" 12

CITATIONS

Cases:

Geer v. State of Connecticut, 161 U.S. (1886) 3, 4

Lacost v. Department of Conservation,
263 U.S. 545 (1924) 4

McCready v. Virginia
94 U.S. 391 (1877)) 3

Magner v. People
97 Ill. 320 (1881) 4

Constitution and Statutes:

U.S. Const. Art. 1, Section 8, Clause 3 6

U.S. Const. Art. IV, Section 3 3

U.S. Const., Amendment X 2

Wild Free-Roaming Horses and Burros Act
16 U.S.C. (Supp. 3; 1331-1340
85 Stat. 649 ..... 2, 3, 5, 8

Idaho Admission Bill
26 Stat. 215, Ch. 656 3

Rules of the Supreme Court (Rule 42, ¶4) 2

Idaho Code:

Ch. 1 through 6, 11, 12, 13, 14, Title 25 2

Title 36 2

State Cases:

Territory v. Evans
2 Idaho 658 (Hasbrouck)
2 Idaho 634 (West Publishing Co.)
7 L.R.A. 288 (1890) 4

Magner v. People
97 Ill. 320 (1881) 4

General Services Administration Materials:

Inventory Report on Real Property Owned by
the United States throughout the World,
June, 1974, GS 1.15, 1974, 559A 6

Miscellaneous:

The Wild Horse of the West, Dr. Walker D. Wyman,
Library of Congress, No. 42W98, S.F.
293.M9W9, 636.168, 1945-1946 — Caxton
Printers, Caldwell, Idaho 7

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JURISDICTION

The jurisdictional statement of the State of New Mexico is here adopted.

CONSENT

The State of Idaho has obtained written consent from both of the parties hereto, and we notice that such consent is unnecessary as to a state attorney general appearing on behalf of the state under the rules of the Supreme Court, Rule 42, ¶4.

INTEREST OF THE STATE OF IDAHO AS AMICUS CURIAE

Idaho's interest in this matter relates to the possibility of the state's continued exercise of the state police powers in relation to Amendment 10 of the United States Constitution; that is, continued enforcement of various of its laws such as laws relating to brand inspection under Chapters 11, 12, 13, and 14 of Title 25 of the *Idaho Code;* animal disease control and quarantine laws, Chapters 1 through 6, Title 25, *Idaho Code;* fish and game laws, Title 36, *Idaho Code;* and indeed as will be further developed in the argument, enforcement of its laws in general, both civil and criminal in relation to persons on federal land in Idaho.

Idaho also, as both New Mexico and Nevada, is faced with the questions raised by New Mexico and Nevada in their briefs and jurisdictional statements as to continued enforcement of the Wild Free-Roaming Horse and Burro Act by the Department of Interior, 85 Stat. 649, 16 U.S.C. (Supp. 3) 1331 as reproduced in Appendix F of Appellee's jurisdictional statement.

ARGUMENT

In this short brief, we will attempt to avoid useless recitation of the points and authorities already established by the State of New Mexico and the State of Nevada. We agree with them.

We do, however, feel that a few of the possible consequences

of a decision in favor of the Department of Interior in this matter should be emphasized.

In this case, much, much more is at issue than the validity of the Wild Free-Roaming Horse and Burro Act, supra. If the Department of Interior is successful in this matter we believe that the way is then open for eventual and complete erosion of any state jurisdiction over its citizens and persons generally on federally-owned lands. We refer particularly to laws such as brand inspection laws, animal disease control laws, fish and game laws, and ultimately, even the control of the state over its citizens on federally-owned lands in matters of general criminal and civil law could be taken away from the western states under the guise of federal control of its property in relation to the property clause of the United States Constitution, Article 4, Section 3.

The Idaho Admission Bill, 26 Stat. 215, Ch. 656, reads as follows:

* * *

> Whereas, said convention and the people of said territory have asked the admission of said territory into the Union of States on an equal footing with the original states in all respects whatever. Therefore,
>
> §1. The state of Idaho is hereby declared to be a state of the United States of America, and is hereby declared admitted into the union on an equal footing with the original states in all respects whatever; . . .

This Court has for many years dealt with the matter of regulation of wild animals and fish and game within the state, and having little or no direct effect on interstate commerce, as a state matter falling exclusively within the state police powers. *McCready v. Virginia,* 94 U.S. 391 (1877); *Geer v. State of*

Connecticut, 161 U.S. 519 (1886)[1]; *Lacoste v. Department of Conservation*, 263 U.S. 545 (1924). In the *Geer* case at 161 U.S. 533, the court quoted with approval from *Magner v. People*, 97 Ill. 320:

> . . . so far as we are aware, it has never been judicially denied that the government under its police powers may make regulations for the preservation of game and fish . . . It is perhaps accurate to say that the ownership of the sovereign authority is in trust for all of the people of the state . . .

Also, the *Lacoste v. Department of Conservation*, supra., case makes a very strong statement of the same principal. So far as we can learn, this principle has never been overruled.

As clearly set forth by the State of New Mexico in its brief on the Motion to Dismiss or Affirm the decree below, pages 9-11, the federal government's abilities under the Property Clause relate to management and protection of its property. The mere fact that an animal comes upon federal property does not and cannot, in and of itself, convert that animal forever after into an

[1]An interesting side light to the *Geer* case, supra, is that it overrules an earlier Idaho territorial case, *Territory v. Evans*, 2 Idaho 658 (Hasbrouck), 2 Idaho 634 (West Publishing Co.), 7 L.R.A. 288 (1890). On page 161, U.S. 534, the Supreme Court stated:

> . . . it was held that a state law prohibiting the shipment outside of the state of game killed therein violated the interstate commerce clause of the Constitution of the United States, but the reasoning which controlled the decision of these cases, we think, *inconclusive*, from the fact that it did not consider the fundamental distinction between the qualified ownership in game and the perfect nature of ownership in other property, and thus overlooked the authority of the state over property in game killed within its confines and the consequent power of the state to follow such property into whatever hands it might pass with the conditions and restrictions deemed necessary for the public interest.

From this, it can be seen that in the *Geer* case even though the law in question in the *Geer* case prohibited shipment of game out of state, the Court did not consider, in that case, that the Interstate Commerce Clause of the U.S. Constitution was involved. This may or may not be the law now, however, it certainly shows the extent to which the Supreme Court has gone to uphold states rights as to wild animals.

animal subject exclusively to federal protection throughout its lifetime. If such were the case under this same guise, any person having once ventured on to federally-owned land might thereafter for all time be declared to be part of the federal lands and "federal man" subject only to federal law to the absolute exclusion of all state law, whether or not the person thereafter remained on federal soil. This cannot be so. To go one step further, in fact the horses or burros under the act in question do not even need to step on federal land at all, under Sections 3 and 8 of the Act, in order to come within most of its terms.

Of course, this is a ridiculous and an absurd example. However, the Act in question here proceeds to claim and take absolute and continuing jurisdiction over all wild and free-roaming horses and burros upon just such a basis and declares them to be part of the land as follows:

Wild Free-Roaming Horses and Burros Act, supra

PREAMBLE

* * *

Wild and free-roaming horses and burros shall be protected from capture, branding, harrassment or death and to accomplish this, they are to be considered in the area where presently found as an integral part of the natural system of the public lands . . .

Section 3 . . . All wild free-roaming horses and burros are hereby declared to be under the jurisdiction of the secretary for the purpose of management and protection in accordance with the provisions of this act . . .

Section 8. Any person who—

(1) wilfully removes or attempts to remove a wild

free-roaming horse or burro from the public lands, without authority of the secretary, or

(2) converts a wild free-roaming horse or burro to private use, without authority from the secretary, or

(3) maliciously causes the death or harrassment of any wild free-roaming horse or burro, or

(4) processes or permits to be processed into commercial products the remains of a wild free-roaming horse or burro, or

(5) sells, directly or indirectly, a wild free-roaming horse or burro maintained on private or leased land pursuant to Section 4 of this act, or the remains thereof, or

(6) wilfully violates a regulation issued pursuant to this Act, . . .

The Act then goes on to provide for fine and imprisonment. It should be noticed that the only provision of Section 8 limited to the public lands is subdivision (1) thereof. All of the rest of the above-quoted provisions claim absolute and complete jurisdiction over all wild free-roaming horses or burros wherever they may be within this country. This law is not based upon the Federal Interstate Commerce Clause, U.S. Constitution, Article 1, Section 8, Clause 3.

In the Appendix to the June, 1974 *Inventory Report on Real Property Owned by the United States Throughout the World*, prepared by General Services Administration, GS 1.15, 1974, 559A will be found tables showing federal ownership of land within the states, state by state. We include these tables in Appendix A and B here to emphasize and show the extent of federal ownership of lands in the various states, particularly in

the western states and the far-reaching effect such a decision as this could have. In the first table in Appendix A appear acreage figures for federally-owned lands, state by state, as well as total acreage for each state and percentage of federally-owned lands. Footnote 2 of the table indicates that trust lands are not included. No issue is made here as to jurisdiction over trust lands. However, that table is included in Appendix B to further show and emphasize the true federal ownership picture. For instance, as to New Mexico, 6,894,984.4 acres are held in trust by the federal government. As to Nevada, 1,143,290 acres are held in trust by the federal government. As to Idaho, 786,445 acres are held in trust by the federal government. Except for Texas, as to the western states, a good percentage and indeed in many cases a majority of the lands are owned or held by the federal government.

An excellent history and historical view of the wild horse in America can be obtained from the book "*The Wild Horse of the West*" by Dr. Walker D. Wyman, written in 1945 and published in 1945 and 1946.[2] From this book, it is apparent that if by wild horse, you mean the old mustang that gained freedom from the Spaniards 300-400 years ago, you are talking about a small horse, almost a pony, ranging from 10-14 hands, and from 650-900 pounds. This animal actually no longer exists, or only exists in very small numbers in isolated places. See for instance, Chapter 7 at page 132, Chapter 9 at page 165, and Chapters 14 and 15, pages 275-315. Dr. Wyman's book is well-written and contains a large bibliography and is well documented. In summarizing the book and as the last paragraph therein, he includes the following:

The little pony left his stamp not only on the hearts of the

---

[2]*The Wild Horse of the West*, Dr. Walker D. Wyman, Library of Congress, No. 42W98, S.F. 293.M9W9, 636.168, 1945-1946 — Caxton Printers, Caldwell, Idaho.

West and on the Western cow pony but also on geography. Several states have a "Wild Horse Plains," or "Wild Horse Mesa." In Texas there are twenty-seven "Mustang Creeks," and a town called "Mustang" in Culbertson County. If the mustang as he once was, a definite horse type with his long mane and tail, his protruding eyes, his bulky head, had been threatened with extermination in 1940, Congress would have rushed to his aid, appropriated money for his preservation. But that horse is gone. If the diluted horse found in the West as late as 1900 were today threatened with destruction, cowboys, Congressmen, and the rest of America would have raised voices against it. But that horse, too, is gone. Rather than preserve degenerate estrays, it is better to look backward to that which once was, and cease thinking of perpetuating that which does not exist. Texas has the idea. Build a statue to the horse that used to be, make it life size, include a stallion, some mares, and a few colts. Let this bronze symbol stand in a public place so that generations that are to come may see the type of horse that contributed the base stock to the Western range horse industry. And on this statue carve a caption taken from a letter to **Life** protesting the destruction of the wild horse herds in recent years: 'Son, that is what was once known as the Western pony.'

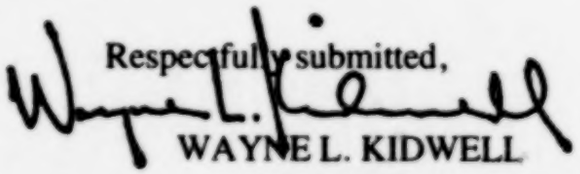
Dr. Wyman carefully documents in his book the fact that the wild mustang probably is no longer in existence to any greater extent than the buffalo. The horses presently running free are generally horses that have escaped or gained their freedom from ranchers and farmers. They are larger, better bred stock than was the mustang. We do not contend that these horses should be treated cruelly, or that they should be maimed or run to death. We feel, however, that a different type of law than the Wild Free-Roaming Horse and Burro Act could and should be used to

carry out such a purpose and that this should be done by the states.

CONCLUSION

The decision of the three-judge court below should be upheld. The appeal should either be dismissed or that decision should be affirmed.

Respectfully submitted,



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APPENDIX A

TABLE 4 — *Comparison of federally owned land with total acreage of States*

State	Acreaged owned by the Federal Government: Public domain	Acreaged owned by the Federal Government: Acquired by other methods	Acreaged owned by the Federal Government: Total	Acreage now owned by Federal Government	Acreage of State[1]	Percent owned by Government[2]
Alabama	29,291.6	1,086,079.5	1,115,371.1	31,563,028.9	32,678,400	3.413
Alaska	352,424,112.1	18,117.1	352,442,229.2	13,039,379.8	365,481,600	96.432
Arizona	31,641,588.6	307,120.8	31,948,709.4	40,739,290.6	72,688,000	43,953
Arkansas	1,068,140.0	2,134,858.0	3,202,998.0	30,396,362.0	33,599,360	9.533
California	42,672,037.9	2,448,099.2	45,120,137.1	55,086,582.9	100,206,720	45.027
Colorado	22,897,826.8	1,075,622.8	23,973,449.6	42,512,310.4	66,485,760	36.058
Connecticut	0	9,514.8	9,514.8	3,125,845.2	3,135,360	.304
Delaware	0	38,594.7	38,594.7	1,227,325.3	1,265,920	3.049
District of Columbia	0	10,203.2	10,203.2	28,836.8	39,040	26.135
Florida	370,675.2	3,051,912.2	3,422,587.4	31,208,692.6	34,721,280	9.857
Georgia	0	2,215,297.2	2,215,297.2	35,080,062.8	37,295,360	5.940
Hawaii	33,287.1	384,537.0	417,824.1	3,687,775.9	4,105,600	10.177
Idaho	32,935,020.2	797,799.9	33,732,820.1	19,200,299.9	52,933,120	63.727
Illinois	437.2	560,948.3	561,385.5	35,233,814.5	35,795,200	1.568
Indiana	432.0	481,296.5	481,728.5	22,676,671.5	23,158,400	2.080
Iowa	340.8	223,434.9	223,775.7	35,636,704.3	35,860,480	.624
Kansas	26,380.8	679,687.7	706,068.5	51,804,651.5	52,510,720	1.345
Kentucky	0	1,348,022.3	1,348,022.3	24,164,297.7	25,512,320	5.284
Lousiana	25,007.3	1,050,230.4	1,075,237.7	27,792,602.3	28,867.840	3.725
Maine	0	130,723.8	130,723.8	19,716,956.2	19,847,680	.659
Maryland	0	200,482.0	200,482.0	6,118,878.0	6,319,360	3.173
Massachusetts	0	74,742.2	74,742.2	4,960,137.8	5,034,880	1.485
Michigan	295,602.7	3,093,946.4	3,389,549.1	33,102,610.9	36,492,160	9.288
Minnesota	1,264,096.3	2,094,073.4	3,358,169.7	47,847,590.3	51,205,760	6.558
Mississippi	66,703.1	1,579,698.6	1,646,401.7	28,576,318.3	30,222,720	5.448
Missouri	2,647.3	2,084,178.5	2,086,825.8	42,161,494.2	44,248,320	4.716
Montana	25,182,924.3	2,468,124.7	27,651,049.0	65,619,991.0	93,271,040	29.646
Nebraska	244,555.5	448,612.4	693,167.9	48,338,512.1	49,031,680	1.414
Nevada	60,594,232.3	180,295.5	60,774,527.8	9,489,792.2	70,264,320	86.494
New Hampshire	0	710,073.0	710,073.0	5,058,887.0	5,768,960	12.309
New Jersey	0	130,928.6	130,928.6	4,682,511.4	4,813,440	2.720
New Mexico	24,262,895.0	1,828,756.7	26,091,651.7	51,674,748.3	77,766,400	33.551
New York	0	245,553.4	245,553.4	30,435,406.6	30,680,960	.800
North Carolina	0	1,952,391.7	1,952,391.7	29,450,488.3	31,402,880	6.217
North Dakota	209,122.5	2,099,483.0	2,308,605.5	42,143,874.5	44,452,480	5.193
Ohio	85.5	327,706.9	327,792.4	25,894,287.6	26,222,080	1.250
Oklahoma	150,795.1	1,386,087.4	1,536,882.5	42,550,797.5	44,087,680	3.486
Oregon	30,998,441.7	1,235,868.1	32,234,309.8	29,364,410.2	61,598,720	52.330
Pennsylvania	0	656,646.1	656,646.1	28,147,833.9	28,804,480	2.280
Rhode Island	0	7,108.9	7,108.9	670,011.1	677,120	1.050
South Carolina	1,597,317.3	1,692,940.8	3,290,258.1	45,591,661.9	48,881,920	6.731
South Dakota	1,597,317.3	1,692,940.8	3,290,258.1	45,591,661.9	48,881,920	6.731
Tennessee	0	1,781,705.2	1,781,705.2	24,945,974.8	26,727,680	6.666
Texas	0	3,178,049.2	3,178,049.2	165,039,550.8	168,217,600	1.889
Utah	34,335,336.9	547,122.7	34,882,459.6	17,814,500.4	52,696,960	66.194
Vermont	0	274,376.9	274,376.9	5,662,263.1	5,936,640	4.622
Virginia	0	2,348,859.2	2,348,859.2	23,147,460.8	25,496,320	9.213
Washington	11,153,063.3	1,423,429.8	12,576,493.1	30,117,266.9	42,693,760	29.458
West Virginia	0	1,066,567.7	1,066,567.7	14,343,992.3	15,410,560	6.921
Wisconsin	10,292.4	1,800,077.5	1,810,369.9	33,200,830.1	35,011,200	5.171
Wyoming	29,320,367.8	607,493.5	29,927,861.3	32,415,178.7	62,343,040	48.005
Total	703,813,056.6	56,719,118.1	760,532,174.7	1,510,811,185.3	2,271,343,360	33.484

[1]Source: U.S. Census of Population

[2]Excludes trust properties.

APPENDIX B

TABLE 10 — *Trust properties in custody of the Federal Government, by agency and state*

State	Total, all agencies				Interior			Smithsonian Institution			Health, Education and Welfare		
	No. of installations	Acres	No. of buildings	No. of installations	Acres	No. of buildings	No. of installations	Acres	No. of buildings	No. of installations	Acres	No. of buildings
Alaska	6	106,115.5	0	6	106,115.5	0	0	0	0	0	0	0
Arizona	58	19,531,502.0	0	25	19,531,343.7	0	0	0	0	33	158.3	0
California	80	543,870.2	0	79	543,867.6	0	0	0	0	1	2.6	0
Colorado	3	755,002.8	0	3	755,002.8	0	0	0	0	0	0	0
District of Columbia	1	312.9	25	0	0	0	1	312.9	25	0	0	0
Florida	3	79,014.1	0	3	79,014.1	0	0	0	0	0	0	0
Idaho	6	786,445.0	26	6	786,445.0	26	0	0	0	0	0	0
Iowa	2	4,132.8	0	2	4,132.8	0	0	0	0	0	0	0
Kansas	6	26,155.6	8	6	26,155.6	8	0	0	0	0	0	0
Lousiana	1	262.2	0	1	262.2	0	0	0	0	0	0	0
Maryland	1	21.0	22	0	0	0	1	21.0	22	0	0	0
Michigan	6	17,180.8	0	6	17,180.8	0	0	0	0	0	0	0
Minnesota	16	734,641.4	0	14	734,618.1	0	0	0	0	2	23.3	0
Mississippi	1	17,382.4	0	1	17,382.4	0	0	0	0	0	0	0
Missouri	1	374.5	0	1	374.5	0	0	0	0	0	0	0
Montana	18	5,120,459.8	0	12	5,120,435.5	0	0	0	0	6	24.3	0
Nebraska	9	61,469.7	0	8	61,459.9	0	0	0	0	1	9.8	0
Nevada	30	1,143,290.0	0	27	1,143,270.1	0	0	0	0	3	19.9	0
New Mexico	38	6,894,989.4	0	28	6,894,939.9	0	0	0	0	10	49.5	0
North Carolina	2	56,443.8	2	2	56,443.8	2	0	0	0	0	0	0
North Dakota	10	843,552.4	0	8	843,538.5	0	0	0	0	2	13.9	0
Oklahoma	24	1,295,714.2	33	22	1,295,695.1	33	0	0	0	2	19.1	0
Oregon	8	761,079.0	7	7	761,078.1	7	0	0	0	1	.9	0
South Dakota	19	4,869,793.2	20	14	4,869,651.4	20	0	0	0	5	141.8	0
Utah	8	2,274,351.4	0	7	2,274,351.2	0	0	0	0	1	.2	0
Washington	29	2,482,303.4	1	27	2,482,301.1	1	0	0	0	2	2.3	0
Wisconsin	10	161,345.3	0	10	161,345.3	0	0	0	0	0	0	0
Wyoming	2	1,885,035.1	0	1	1,885,032.4	0	0	0	0	1	2.7	0
Total	398	50,452,230.9	144	326	50,451,437.4	97	2	333.9	47	70	408.6	0

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No. 74-1488

In the Supreme Court of the United States

OCTOBER TERM, 1975

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR,
APPELLANT

v.

STATE OF NEW MEXICO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

BRIEF FOR THE SECRETARY OF THE INTERIOR

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Constitutional provisions and statutes involved	2
Question presented	3
Statement	3
Argument:	
The Wild Free-Roaming Horses and Burros Act does not exceed the powers conferred upon Congress by the Property and Commerce Clauses of the Constitution	10
Introduction and summary	10
A. The Wild Free-Roaming Horses and Burros Act is constitutional Under the Property Clause	12
B. The Act is valid under the Commerce Clause	20
Conclusion	23

CITATIONS

Cases:	
Alabama v. *Texas*, 347 U.S. 272	12
Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288	14, 17
Bailey v. *Holland*, 126 F. 2d 317	16
Camfield v. *United States*, 167 U.S. 518	13
Cerritos Gun Club v. *Hall*, 96 F. 2d 620	21
Chalk v. *United States*, 114 F. 2d 204, certiorari denied, 312 U.S. 679	16
Cochrane v. *United States*, 92 F. 2d 623, certiorari denied, 303 U.S. 626	21
Federal Power Commission v. *Idaho Power Co.*, 344 U.S. 17	12
Geer v. *Connecticut*, 161 U.S. 519	18, 19
Gibson v. *Chouteau*, 13 Wall. 92	12

598-079--75——1

Cases—Continued

	Page
Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241	20–21, 22
Hunt v. *United States*, 278 U.S. 96	13, 16, 17, 19
Ivanhoe Irrigation District v. *McCracken*, 357 U.S. 275	12
Katzenbach v. *McClung*, 379 U.S. 294	21
Lacoste v. *Department of Conservation*, 263 U.S. 545	19
Light v. *United States*, 220 U.S. 523	15
Manchester v. *Massachusetts*, 139 U.S. 240	19
Maryland v. *Wirtz*, 392 U.S. 183	23
McKelvey v. *United States*, 260 U.S. 353	13, 18
Missouri v. *Holland*, 252 U.S. 416	15, 19
New Mexico State Game Commission v. *Udall*, 410 F. 2d 1197, certiorari denied, 396 U.S. 961	16
Oklahoma v. *Atkinson Co.*, 313 U.S. 508	22
Perez v. *United States*, 402 U.S. 146	21
Thornton v. *United States*, 271 U.S. 414	21
Toomer v. *Witsell*, 334 U.S. 385	15, 19
United States v. *Bass*, 404 U.S. 336	23
United States v. *Beebe*, 127 U.S. 338	15
United States v. *California*, 332 U.S. 19	12, 15
United States v. *Gratiot*, 14 Pet. 526	12, 13, 14
United States v. *San Francisco*, 310 U.S. 16	12, 13
United States v. *State of Alaska*, 423 F. 2d 764, certiorari denied, 400 U.S. 967	16
United States v. *State of Washington*, 384 F. Supp. 312	19
Utah Power & Light Co. v. *United States*, 243 U.S. 389	13
Wickard v. *Filiburn*, 317 U.S. 111	22
Constitutional provisions:	
Constitution of the United States:	
Article I, Section 8, Clause 3	2, 19, 20, 21
Article IV, Section 2, Clause 1	19
Article IV, Section 3, Clause 2	2, 12, 16, 17, 18, 19, 20, 23
Article VI, Clause 2	20
Statutes and regulations:	
Taylor Grazing Act, 48 Stat. 1270, as amended, 43 U.S.C. 315b	7, 18
Wild Free-Roaming Horses and Burros Act, 85 Stat. 649–651, 16 U.S.C. (Supp. III) 1331–1340	2, 3, 10

Statutes and regulations—Continued	Page
Section 1331	3, 11, 14, 23
Section 1332	4
Section 1332(2)(b)	3, 8
Section 1333(a)	4, 16
Section 1333(d)	22
Section 1334	4
Section 1336	6
Section 1337	21
Section 1338(a)	4
Section 1338(a)(4)	22
Section 1338(a)(5)	4
Section 1340	5
28 U.S.C. 2282	9
New Mexico Statutes Annotated (1953):	
Section 47-14-1	2, 6
Section 47-14-5	2
Section 47-23-2(A) (1973 Supp.)	2
36 C.F.R. 231.11	6
43 C.F.R. Part 4710	6
Miscellaneous:	
Hearing on the Administration of Public Law 92–105—the Wild Free-Roaming Horses and Burros Protection Act of 1971 Before the Senate Committee on Interior and Insular Affairs, 93 Cong., 2d Sess. (1974)	5
Hearings on H.R. 795, H.R. 5375 and Related Bills (Protection of Wild Horses on Public Lands) Before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs, 92d 1st Sess. (1971)	21
Hearing on S. 862, S. 1116, S. 1090, and S. 1119 (Protection of Wild Horses and Burros on Public Lands) Before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, 92d Cong., 1st Sess. (1971)	15, 21
H.R. Conf. Rep. No. 92-681, 92d Cong., 1st Sess. (1971)	14
H.R. Rep. No. 92-480, 92d Cong., 1st Sess. (1971)	10, 22
Report to Congress by the Secretary of the Interior and the Secretary of Agriculture on Administration of the Wild Free-Roaming Horse and Burro Act (June 1974)	5
S. Rep. No. 92-242, 92d Cong., 1st Sess. (1971)	10, 15, 22

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BRIEF FOR THE SECRETARY OF THE INTERIOR

OPINION BELOW

The opinion of the district court (J.S. App. A, pp. 1a-6a) is not yet reported.

JURISDICTION

The judgment of the three-judge district court was entered on February 28, 1975 (J.S. App. B, pp. 7a-8a). The notice of appeal to this Court was filed on March 28, 1975 (J.S. App. C, p. 9a). The first amended

judgment of the district court was entered on March 31, 1975 (J.S. App. D, pp. 10a–11a). The supplemental notice of appeal was filed on April 14, 1975 (J.S. App. E, pp. 12a–13a). This Court noted probable jurisdiction on October 6, 1975 (App. 93). The jurisdiction of this Court rests on 28 U.S.C. 1252 and 1253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article IV, Section 3, Clause 2 of the United States Constitution (the "Property Clause") provides:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

2. Article I, Section 8, Clause 3 of the United States Constitution (the "Commerce Clause") provides in part:

> The Congress shall have power * * * [t]o regulate Commerce with foreign Nations, and among the several States * * *.

3. The Wild Free-Roaming Horses and Burros Act, 85 Stat. 649–651, 16 U.S.C. (Supp. III) 1331–1340, enacted December 15, 1971, is reproduced in Appendix F of the Jurisdictional Statement.

4. The revelant provisions of Sections 47–14–1, 47–14–5, and 47–23–2(A) of the New Mexico Statutes Annotated are set forth in Appendix G of the Jurisdictional Statement.

QUESTION PRESENTED

Whether the Wild Free-Roaming Horses and Burros Act, which protects unbranded and unclaimed horses and burros on public lands of the United States from capture, harassment, or death, exceeds the powers conferred upon Congress by the Property and Commerce Clauses of the Constitution.

STATEMENT

At issue in this case is the constitutionality of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. (Supp. III) 1331–1340 (J.S. App. F, pp. 14a–20a). That Act defines wild free-roaming horses and burros to mean "all unbranded and unclaimed horses and burros on public lands of the United States" (Section 2(b), 16 U.S.C. 1332(2)(b)). Section 1 of the Act establishes a policy of protecting these animals "from capture, branding, harassment, or death," and provides that "to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands" (16 U.S.C. 1331).

The Act provides that all wild free-roaming horses and burros on the public lands administered by the Secretary of the Interior through the Bureau of Land Management are committed to the jurisdiction of the Secretary, who is "directed to protect and manage [the animals] as components of the public lands * * *

in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands" (Section 3(a), 16 U.S.C. 1333(a)).[1] The Act makes it a crime to remove a protected horse or burro from public lands onto privately owned land, the private use without the Secretary's permission, or maliciously to kill or harass such an animal, or to process its remains into commercial products (Section 8(a), 16 U.S.C. 1338(a)). If horses or burros "stray from [redacted] public lands onto privately owned land, the owners of such land may inform the nearest Federal marshall or agent of the Secretary, who shall arrange to have the animals removed" (Section 4, 16 U.S.C. 1334).[2]

On June 26, 1974, Congress held a hearing to determine how the Act had been administered up until then, and how the agencies responsible for its administration intended to enforce it in the future. Representatives from the Department of the Interior testified at length concerning the studies in progress respecting the population of wild free-roaming horses and burros and their relationship to the ecosystems in which they were found, and the feasibility of establishing federal ranges in which competing uses of the land would be prohibited.[3] These topics were also discussed in "A Report to Congress by the Secretary of the Interior and the Secretary of Agriculture on Administration of the Wild Free-Roaming Horse and Burro Act," which was submitted to Congress in June 1974 pursuant to the reporting provisions of Section 10 of the Act (16 U.S.C. 1340). In that report (p. 30)[3a] it was noted that the number of wild horses and burros on lands managed by the Bureau of Land Management appeared to be greater than previously estimated, although the number on Forest Service lands appeared to be the same. The report also stated (*ibid.*) that wild free-roaming horses and burros "are not vanishing breeds, although there are marginal herds."

With regard to New Mexico in particular, the report estimated the population of wild free-roaming burros on federal public lands in that state to be 85 (p. 31). The state director of the Bureau of Land Management in September 1973 stated that wild horses and burros were "proving almost unknown on federal public lands in New Mexico" (Pl. Exh. 12; App. 83).[4]

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[1] The Act applies with equal force to wild free-roaming horses and burros on public lands administered by the Secretary of Agriculture through the Forest Service (Section 2, 16 U.S.C. 1332).

[2] A private landowner is not prohibited by the Act from maintaining wild free-roaming horses and burros on his land provided that he protects them from harassment and did not willfully entice them from the public lands (Section 4, 16 U.S.C. 1334). Sale of a wild free-roaming horse or burro so maintained, or of the remains thereof, is prohibited (Section 8(a)(5), 16 U.S.C. 1338(a)(5)).

[3] Hearing on the Administration of Public Law 92-195—the Wild Free-Roaming Horse and Burros Protection Act of 1971, Before the Senate Committee on Interior and Insular Affairs, 93d Cong., 2d Sess. 48-92 (1974).

[3a] We are lodging a copy of the report with the Clerk of this Court.

[4] The director of the New Mexico Livestock Board testified that "there could be seven or eight hundred burros" in New Mexico (App. 39), but this estimate included "all the animals on all of the lands in the State of New Mexico" (App. 38), and thus would include burros not subject to federal protection under the Act.

598-079—75——2

Section 6 of the Act (16 U.S.C. 1336) authorizes the Secretary to promulgate regulations [5] and to enter into cooperative agreements with other landowners and states and local governmental agencies to further the Act's purposes. On August 7, 1973, the Secretary executed such an agreement (Def. Exh. A; App. 85) with the State of New Mexico through the New Mexico Livestock Board, the state agency charged with enforcing the New Mexico Estray Law (N. Mex. Stat. Ann. §§ 47–14–1, *et seq.* (1953)). Under this agreement, the state Livestock Board recognized the authority of the Secretary of the Interior [6] to manage and protect wild free-roaming horses and burros on the public lands of the United States within the state (App. 86). The agreement set up a procedure for evaluation of claims by private persons to ownership of such animals found on public lands where wild free-roaming horses and burros are known or suspected to exist (*id.* at 87).

On November 15, 1973, however, the New Mexico Livestock Board terminated the agreement (Pl. Exh. 4; App. 71) and advised the Secretary of its intent

> * * * to exercise all regulatory impoundment and sale powers which it derives from the New Mexico Estray Law, over all estray horses, mules or asses found running at large upon public or private lands within New Mexico * * *.

[5] The regulations of the Secretary of the Interior appear at 43 C.F.R. Part 4710, and of the Secretary of Agriculture at 36 C.F.R. 231.11.

[6] And the authority of the Secretary of Agriculture with respect to public lands administered by the Forest Service.

> This includes the right to go upon Federal or State lands to take possession of said horses or burros, should the Livestock Board so desire. [App. 72.]

The Livestock Board additionally asserted that the state had exclusive ownership and regulatory powers over all non-migratory wild animals within the state's boundaries "whether said animals are on Federal or State lands" and that "the Federal government has no right to control, regulate or assert ownership of these animals" (App. 72–73).

On February 1, 1974, a New Mexico rancher was informed by the Department of the Interior's Bureau of Land Management that several unbranded burros had been seen near Taylor Well, which is located on federal property (*id.* at 48–49). The rancher, who was engaged in the cattle business, had a federal grazing permit [7] allowing him to run two-hundred head of cattle on approximately 8,000 acres of federal land administered by the BLM, including the Taylor Well area (*id.* at 44, 46–47, 74). On February 4, 1974, after visiting the Taylor Well area and observing the burros, the rancher complained to the New Mexico Livestock Board that the burros were interfering with his livestock operation by molesting his cattle and eating their feed (*id.* at 32–33, 50, 75).[8]

On February 11, 1974, agents of the New Mexico Livestock Board, purportedly acting pursuant to the

[7] See Taylor Grazing Act, 48 Stat. 1270, as amended, 43 U.S.C. 315b.

[8] The rancher testified that for at least the past 29 years approximately 8 to 10 burros had inhabited the fee land to the east of the federal property (*id.* at 48).

New Mexico Estray Law, rounded up and removed 19 unbranded and unclaimed burros found in the vicinity of Taylor Well (Pl. Exh. 5; App. 74). Each burro was on the public lands of the United States when it was captured and taken away (*id.* at 76) and the director of the state Livestock Board conceded that the animals fit the description of "wild free-roaming" burros under Section 2(b) of the Act (16 U.S.C. 1332(2)(b)) (*id.* at 43).

One week later, on February 18, 1975, the state Livestock Board sold the burros at a public auction (*id.* at 77). The director of the Livestock Board testified that the animals are usually sold at such auctions to private individuals or companies, including food processors, ranches and horse traders (*id.* at 39–40). One of the respondents here—Claude Foster—allegedly purchased three of the burrows (*id.* at 8).[9]

After learning of the round-up and sale, the Bureau of Land Management, asserting jurisdiction over the burros under the Wild Free-Roaming Horses and Burros Act, demanded that the state Livestock Board recover the animals and return them to the public lands (*id.* at 36).

In March 1974, appellees (the State of New Mexico, the New Mexico Livestock Board, the Board's director, and a purchaser of three of the burros) brought this action in the United States District Court for the District of New Mexico. The complaint sought a declaratory judgment that the Wild Free-Roaming

[9] The identity of the purchaser of the remaining burros is not shown in the record.

Horses and Burros Act is unconstitutional and an injunction against the Act's enforcement (App. 6). A three-judge court was convened pursuant to 28 U.S.C. 2282.

After an evidentiary hearing held September 30, 1974 (App. 24–63), the district court on February 28, 1975, ruled that the Wild Free-Roaming Horses and Burros Act is unconstitutional and permanently enjoined the Secretary of the Interior from enforcing its provisions (J.S. App. A, pp. 1a–6a).[10] The court held that the Act "conflicts with * * * the traditional doctrines concerning wild animals" (*id.* at 3a), and that Congress is without constitutional authority under the Property Clause to regulate animals found on federal lands unless such regulation is necessary for the "*protection* of the public lands from damage of some kind" (*id.* at 5a; emphasis in original). Here, however, "[t]he statute is aimed at protecting the wild horses and burros, not at protecting the land they live on," and "[t]here is no Congressional finding nor any evidence to indicate that wild horses and burros are damaging the public lands" (*ibid.*). The court also held that the Act cannot be sustained as an exercise of congressional authority under the Commerce Clause, because "all the evidence establishes that the wild burros in question here do not migrate across state lines" and "Congress made no findings to indicate that

[10] On March 7, 1975, the district court stayed its injunction pending further order of the court (App. 90) and a formal stay motion from the United States. Such a motion was filed on March 18, 1975 (App. 91); it has not been acted on and the original stay remains in effect.

it was in any way relying on the Commerce Clause in enacting this statute" (*id.* at 5a–6a).[11]

ARGUMENT

THE WILD FREE-ROAMING HORSES AND BURROS ACT DOES NOT EXCEED THE POWERS CONFERRED UPON CONGRESS BY THE PROPERTY AND COMMERCE CLAUSES OF THE CONSTITUTION

INTRODUCTION AND SUMMARY

Although an estimated two million wild horses once roamed the plains and mountains in the West, in this century their numbers have drastically dwindled.[12] Congress found in 1971 that these animals "have been cruelly captured and slain and their carcasses used in the production of pet food and fertilizer. They have been used for target practice and harassed for 'sport' and profit. In spite of public outrage, this bloody traffic continues unabated, and * * * this senseless slaughter must be brought to an end."[13] In order to prevent wild horses and burros from becoming extinct, Congress enacted the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. (Supp. III) 1331–1340, which

[11] On March 31, 1975, in response to the government's motion to dismiss as parties defendant the United States and the United States Attorney, the district court amended its judgment to run against the Secretary of the Interior only (J.S. App. D, pp. 10a–11a).

[12] The Department of the Interior estimated in 1971 that less than 10,000 remain. H.R. Rep. No. 92–480, 92d Cong., 1st Sess. 3 (1971).

[13] S. Rep. No. 92–242, 92d Cong., 1st Sess. 1–2 (1971).

protects these animals on the public lands of the United States by prohibiting their removal, harassment or slaughter. Although Congress expressly found in Section 1 of the Act (16 U.S.C. 1331) that wild horses and burros are "an integral part of the natural system of the public lands," and although the legislative history of the Act demonstrates its validity under both the Property Clause and the Commerce Clause, the district court held that the Act exceeded congressional authority under the Constitution and, accordingly, that Congress lacked any power to protect these animals.

We argue in Part A, *infra,* that as an incident of its broad powers under the Property Clause to manage and preserve the public lands of the United States Congress may legislate to protect the wild animals thereon just as it may regulate other valuable components of the public land such as hydroelectric energy, timber, and minerals. In determining what are "needful" laws with respect to the public domain, Congress may, as it has done here, exercise what are essentially police powers to protect and preserve the natural resources of the public lands for the use and enjoyment of future generations. State laws that would interfere with Congress' exercise of these constitutional powers are invalid under the Supremacy Clause.

In Part B, *infra,* we argue that the Wild Free-Roaming Horses and Burros Act is also within the power of Congress to enact under the Commerce

Clause. The animals subject to the Act cross state lines; they attract persons from all parts of the country who are interested in observing and studying them; and their remains when rendered into pet food enter channels of commerce. This argument need not be reached, of course, if we are correct in our contention that the Act is constitutional under the Property Clause.

A. The Wild Free-Roaming Horses and Burros Act is constitutional under the Property Clause

The power of Congress to regulate and protect wild animals on the public lands of the United States is derived from its plenary authority over federal lands. The Property Clause of the Constitution, Article IV, Section 3, Clause 2, provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." What constitutes a "needful" rule or regulation respecting the public lands is committed by the Constitution to the judgment of Congress. Accordingly, this Court has repeatedly held that "[t]he power over the public land thus entrusted to Congress is without limitations." *United States* v. *San Francisco,* 310 U.S. 16, 29; *United States* v. *Gratiot,* 14 Pet. 526, 537; *Gibson* v. *Chouteau,* 13 Wall. 92, 99; *United States* v. *California,* 332 U.S. 19, 27; *Federal Power Commission* v. *Idaho Power Co.,* 344 U.S. 17, 21; *Alabama* v. *Texas,* 347 U.S. 272, 273; *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275, 294–295.

Congress as the proprietor of the public domain acts as "trustee for the people of the United States" (*Camfield* v. *United States,* 167 U.S. 518, 524; see also *Utah Power & Light Co.,* v. *United States,* 243 U.S. 389, 409), "[a]nd it is not for the courts to say how that trust shall be administered. That is for Congress to determine" (*United States* v. *San Francisco, supra,* 310 U.S. at 29–30; see also *United States* v. *Gratiot, supra,* 14 Pet. at 537–538).

As an adjunct to and in protection of its ownership rights, Congress may, as it has done here, exercise what are essentially police powers (*Utah Power & Light Co.* v. *United States, supra,* 243 U.S. at 405; *Camfield* v. *United States, supra,* 167 U.S. at 525–526), irrespective of conflicting state claims (*United States* v. *Gratiot, supra,* 14 Pet. at 538); *McKelvey* v. *United States,* 260 U.S. 353, 359; *Hunt* v. *United States,* 278 U.S. 96, 100). It is not that the Property Clause authorizes "an exercise of a general control over public policy in a State[,] but instead only an exercise of the complete power which Congress has over particular public property entrusted to it" (*United States* v. *San Francisco, supra,* 310 U.S. at 30).

The "complete power" that Congress has over the public lands necessarily includes the power to regulate and protect the wildlife living there. The Property Clause could hardly be read otherwise. Any contrary view leads to the untenable proposition that Congress—and thus the people of the United States—must suffer the destruction and removal of wildlife

The district court in the present case, however, citing *Hunt* v. *United States, supra,* concluded that the power of Congress is limited to protecting federal lands from physical damage and does not extend to protecting wild animals found on the lands (J.S. App. A, p. 5a).[18] But *Hunt* held only that damage to the "land" was a *sufficient* basis for invoking the Property Clause; it did not hold or imply that damage is *necessary* as a basis for federal regulation.[19] The Property Clause itself empowers Congress to dispose of the public lands and the United States has

[18] Despite the district court's contrary assumption, it is hardly clear that this Act is not designed to prevent damage to the public lands. Congress expressly stated that the animals were to be managed and protected in order "to achieve and maintain a thriving natural ecological balance on the public lands" (Section 3(a), 16 U.S.C. 1333(a)). It is, however, unnecessary to dwell on this point since, as we argue *infra* at p. 17, the distinction between legislation for the purpose of protecting the land from damage and other legislation regarding the public lands is not one that the Constitution recognizes.

[19] Nor did *Chalk* v. *United States*, 114 F. 2d 207 (C.A. 4), certiorari denied, 312 U.S. 679, or *New Mexico State Game Commission* v. *Udall*, 410 F. 2d 1197 (C.A. 10), certiorari denied, 396 U.S. 961, also relied on by the district court, so imply. The latter decision is in fact direct authority for the government's position in this case. There the court upheld the Secretary's power, without interference from state authorities, to kill deer in the Carlsbad Caverns National Park as part of a research program deemed essential by him in connection with the preservation of "the scenery, natural and historic objects, and wildlife of the park" (*id.* at 1201). The court plainly and, in our view, correctly perceived the federal government's power to protect its property to extend to both "the park lands and the wildlife thereon" (*ibid.*). See also *United States* v. *States of Alaska*, 423 F. 2d 764, 768 (C.A. 9), certiorari denied, 400 U.S. 967; *Bailey* v. *Holland*, 126 F. 2d 317, 324 (C.A. 4).

authority under the Clause to conduct mining operations on such lands. Neither federal activity appears to be designed to protect the land yet both are clearly authorized by the Property Clause. See *Ashwander* v. *Tennessee Valley Authority, supra,* 297 U.S. at 332–333.

Moreover, *Hunt* concerned the authority of the federal government to reduce the deer population in national forests and game preserves in order to prevent destruction of "valuable young trees, shrubs, bushes and forage plants" caused by overbrowsing (278 U.S. at 99). If Congress is empowered to legislate in order to protect the flora on public lands it is difficult to perceive anything in the Constitution that bars Congress from acting, as it has here, to preserve the fauna on those lands.

Thus, there is no basis for a distinction between legislation designed to protect the land itself and legislation designed to protect the wild animals that depend on the land for their survival. Both are regulations "respecting" the land and so long as Congress finds them "needful," the Constitution requires no more.

Indeed, it is unnecessary to go beyond the facts of this case to demonstrate the unsoundness of the district court's contrary interpretation of the Property Clause. The state agency's seizure of the burros here was precipitated by the complaint of a rancher that the burros were interfering with his cattle, which were allowed to graze on the public lands of the United

States only because he had obtained a grazing permit under the Taylor Grazing Act, 48 Stat. 1270, as amended, 43 U.S.C. 315b. Yet if the court below is correct that Congress can legislate only to protect "the public lands from damage of some kind" (J.S. App. A, p. 5a), there would be substantial doubt whether a federal statute that permits private individuals to graze their cattle on the public lands meets that test.

In short, the Property Clause empowers Congress to forbid, as it has done here, the use of the public lands for the harassment, capturing, or killing of the wild horses and burros found thereon, and the district court erred in ruling otherwise. Regardless of any inconsistent state laws, the federal government has the power to manage wildlife in federal lands. As the Court stated in *McKelvey* v. *United States, supra,* 260 U.S. at 359, "[i]t is firmly settled that Congress may prescribe rules respecting the use of the public lands. It may sanction some uses and prohibit others, and may forbid interference with such as are sanctioned."

Contrary to the district court, this result does not conflict with "traditional doctrines concerning wild animals" (J.S. App. A, p. 3a). Those doctrines essentially declare the states' paramount control over wildlife in respect to their citizens. They do not entitle the states to regulate wildlife on federal lands over the objection of the federal government. No state has an interest in wild animals on federal lands sufficient to defeat the Congress' power to protect them.

While *Geer* v. *Connecticut,* 161 U.S. 519, and decisions following it, have sustained the state's police

power to regulate the killing of wildlife, *Geer* itself recognized that the power to regulate game, which passed to the states from the English common law "and remains in them at the present day," exists only "in so far as its exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution" (161 U.S. at 528).[20] This Court has never recognized "property" or regulatory rights in the states over wildlife that preclude federal legislation in this area. "No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of [wildlife], but it does not follow that its authority is exclusive of paramount powers." *Missouri* v. *Holland,* 252 U.S. 416, 434.[21]

Thus, the states' police powers over wildlife do not limit the federal government's power under the Prop-

[20] See also *Hunt* v. *United States, supra,* 278 U.S. at 100; *Manchester* v. *Massachusetts,* 139 U.S. 240, 262; *United States* v. *State of Washington,* 384 F. Supp. 312, 335, 342 (W.D. Wash.). Cf. *Lacoste* v. *Department of Conservation,* 263 U.S. 545.

[21] See also *Toomer* v. *Witsell,* 334 U.S. 385, where the Court invalidated, as repugnant to the Privileges and Immunities Clause (Art. IV, Section 2, Clause 1), a South Carolina statute imposing prohibitory licensing fees on non-residents fishing for shrimp in the three-mile maritime belt off the coast of that state. South Carolina sought unsuccessfully to justify the discrimination on the basis of its "special property interest" (*id.* at 399–400) in wildlife. In rejecting this contention the Court said that "[t]he whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource" (*id.* at 402; footnote omitted). Moreover, the Court pointed out that this regulatory power could be exercised in the marginal sea only in the absence of a conflicting federal regulation of the fishery (*id.* at 388, 393, 394, 406).

erty Clause (or the Commerce Clause), and do not defeat an otherwise legitimate exercise of constitutional authority such as the Act at issue here. To say this is simply to recognize the result of the Supremacy Clause of the Constitution (Article VI, clause 2).

B. The Act is valid under the Commecre Clause

In seeking to sustain the constitutionality of the Wild Free-Roaming Horses and Burros Act in the district court, the government invoked, in addition to the Property Clause, the Commerce Clause. The district court rejected this on the following basis (J.S. App. A, pp. 5a–6a):

> No evidence was presented to support this theory; in fact, all the evidence establishes that the wild burros in question here do not migrate across state lines. Further, the Congress made no findings to indicate that it was in any way relying on the Commerce Clause in enacting this statute. This argument must fail.

We believe it unnecessary for the Court to reach this point since, in our view, the Act is constitutional as a valid exercise of Congress' power under the Property Clause. But the Commerce Clause does, in any event, provide an independent basis for sustaining this legislation.

The district court's objection that Congress made no findings indicating reliance on the Commerce Clause is not well-taken. The constitutionality of legislation under the Commerce Clause does not depend on whether Congress formally invoked the Clause. See, *e.g.*, *Heart of Atlanta Motel, Inc.* v. *United States*, 379

U.S. 241, 252–253. And Congress is not required to make any particularized findings in order to legislate under the Clause. *Perez* v. *United States*, 402 U.S. 146, 150; *Katzenbach* v. *McClung*, 379 U.S. 294, 299 ("no formal findings were made, which of course are not necessary").

Moreover, the fact that the particular animals seized and removed here may not have migrated across state lines does not render the Act unconstitutional. Wild horses and burros in general do range across state lines, and Congress was well aware of this (see Senate Hearing, *supra*, note 16, at 45, 52, 61, 63). Regardless whether this interstate movement alone is sufficient to sustain Congress' power to regulate them under the Commerce Clause (see *Thornton* v. *United States*, 271 U.S. 414, 425; *Cerritos Gun Club* v. *Hall*, 96 F. 2d 620, 624–627 (C.A. 9); *Cochrane* v. *United States*, 92 F. 2d 623, 627 (C.A. 7), certiorari denied, 303 U.S. 636) the legislative history discloses other connections with interstate commerce as well.

For example, wild free-roaming horses and burros are objects of interest to amateur students of nature and professional scientists, who travel in interstate commerce to observe and study them.[22] Moreover, the legislative history shows that Congress was

[22] *E.g.*, Protection of Wild Horses on Public Lands, Hearings on H.R. 795, H.R. 5375 and Related Bills Before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs, 92d Cong., 1st Sess., 78, 99, 110, 134, 161, 196, 199 (1971); Senate Hearing, *supra* note 16, at 69, 122, 128, 138, 142, 143. The Act itself provides for the establishment of an advisory board composed of persons with "special knowledge about protection of horses and burros, management of wildlife, animal husbandry, or natural resources management." Section 7, 16 U.S.C. 1337.

concerned with the commercial exploitation of wild horses and burros and that the Act was designed in part to prevent such exploitation. The Senate Committee found that they "have been cruelly captured and slain and their carcasses used in the production of pet food and fertilizer"; it was "the expressed intent of the committee to remove the possibility of monetary gain from exploitation of these animals" (S. Rep. No. 92–242, 92d Cong., 1st Sess. 1–2, 4 (1971)). The House Committee likewise sought to end the "commercialization" of these animals by eliminating "the processing of wild horses and burros into pet food" (H.R. Rep. No. 92–480, 92d Cong., 1st Sess. 4 (1971)).[23]

Thus, the effect upon interstate commerce of the commercial exploitation of wild horses and burros, as well as the interstate movement of the live animals themselves and the persons interested in observing them, empowered Congress to enact appropriate legislation. That legislation is no less valid because it serves other purposes as well. *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241, 257; *Oklahoma* v. *Atkinson Co.,* 313 U.S. 508, 528.

Further, this is not a case in which the federal

[23] The Act accordingly makes it a crime to process the remains of a wild horse or burro into "commercial products" (Section 8(a)(4), 16 U.S.C. 1338(a)(4)), and forbids the sale of the remains of a deceased animal "for any consideration, directly or indirectly" (Section 3(d), 16 U.S.C. 1333(d)). The commerce power, as well as the property power extends to such commercial acts affecting interstate commerce even where the entire process, through consumption of the products, takes place within one state. *Wickard* v. *Filburn,* 317 U.S. 111.

regulation unduly intrudes upon local affairs (cf. *United States* v. *Bass,* 404 U.S. 336, 349–350) or in which a "relatively trivial impact on commerce [is used] as an excuse for broad general regulation of state or private activities." *Maryland* v. *Wirtz,* 392 U.S. 183, 196–197 n. 27. Wild free-roaming horses and burros are of national importance; they are, as Congress found, "living symbols of the historic and pioneer spirit of the West; * * * they contribute to the diversity of life forms within the Nation and enrich the lives of the American people" (Section 1, 16 U.S.C. 1331). In protecting them from capture, harassment and death, Congress was not improperly intruding upon legitimate state and private activities but was legislating within its authority under the Commerce Clause.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

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Appellant,

VS.

STATE OF NEW MEXICO, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ANSWER BRIEF FOR THE STATE OF NEW MEXICO, ET AL.

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INDEX

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

QUESTIONS PRESENTED 3

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 7

ARGUMENT—

I. Whether the Three-Judge Court Correctly Held That the Wild Free-Roaming Horses and Burros Act Is in Excess of the Power of Congress Under the Property Clause of the United States Constitution, and That the Act May Not Be Sustained As an Exercise of the Power of Congress Under the Commerce Clause of the Constitution 13

II. Whether the Act Infringes on the Sovereignty, Legislative Authority and Police Powers of the State As Attested to by the 10th Amendment of the United States Constitution, and Intrudes on the State's Trustee Powers Over Resident Wild Animals 24

CONCLUSION 33

Citations

CASES

Afroyim v. *Rusk*, 387 U.S. 253 13

Alabama v. *Texas*, 347 U.S. 272 26

Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 ..... 14, 15

Barney v. *Keokuk*, 94 U.S. 324 35
Block v. *Hirsh*, 256 U.S. 135 .....10, 30, 31
Camfield v. *United States*, 167 U.S. 518 .....14, 25, 26
Clason v. *State of Indiana*, 306 U.S. 439 33
Colorado v. *Toll*, 268 U.S. 228 .....24, 26
Federal Compress and Warehouse Co. v. *McLean*, 291 U.S. 17 17
Fort Leavenworth R. Co. v. *Lowe*, 114 U.S. 525 .....25, 26
Fry v. *United States*, ... U.S. ....., 95 S.Ct. 1792 .....11, 35
Geer v. *Connecticut*, 161 U.S. 519 .....10, 16, 26, 28, 29
Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 .....20, 21, 22
Hunt v. *United States*, 270 U.S. 96 14
Kansas v. *Colorado*, 206 U.S. 46 15
Katzenbach v. *McClung*, 379 U.S. 294 .....21, 22
Lacoste v. *Department of Conservation*, 263 U.S. 545 .....10, 16, 26, 28, 29
Leary v. *United States*, 395 U.S. 6 .....10, 30, 31
Marbury v. *Madison*, 1 Cr. 137 8
Maryland v. *Wirtz*, 392 U.S. 183 .....19, 23
McCaughn v. *Hershey Chocolate Co.*, 283 U.S. 488 19
McCready v. *Virginia*, 94 U.S. 391 28
Missouri v. *Holland*, 252 U.S. 416 14
Oregon v. *Mitchell*, 400 U.S. 112 17
Paul v. *United States*, 371 U.S. 245 25
Penn Dairies v. *Milk Control Commission*, 318 U.S. 261 17
Perez v. *United States*, 402 U.S. 146 .....21, 22
Powell v. *McCormack*, 395 U.S. 486 35
Santa Cruz Fruit Packing Co. v. *National Labor Relations Board*, 303 U.S. 453 23

Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U.S. 384 18
Sinclair v. *United States*, 279 U.S. 263 .....25, 26
South Carolina v. *United States*, 199 U.S. 437 17
Surplus Trading Co. v. *Cook*, 281 U.S. 647 24
Toomer v. *Witsell*, 334 U.S. 385 .....28, 29, 30
Townsend v. *Yeomans*, 301 U.S. 441 17
United States v. *Allegheny County, Pa.*, 322 U.S. 174 9
United States v. *American Trucking Associations*, 310 U.S. 534 18
United States v. *Oregon*, 366 U.S. 643 18
United States v. *San Francisco*, 310 U.S. 16 13
United States v. *United Mine Workers*, 330 U.S. 258 18-19
United States v. *Wrightwood Dairy Co.*, 315 U.S. 110 19
Utah Power and Light v. *United States*, 243 U.S. 389 ..14, 15
Van Brocklin v. *Tennessee*, 117 U.S. 151 .....9, 35
Ward v. *Race Horse*, 163 U.S. 504 17
Wilson v. *Cook*, 327 U.S. 474 .....9, 24, 34

CONSTITUTION AND STATUTES

United States Constitution
Amendment X 2, 24
16 U.S.C. (Supp. III) §1331-1340 3
16 U.S.C. §1331 .....5, 11, 30
16 U.S.C. §1332 3
16 U.S.C. §1332(2)(b) 3
16 U.S.C. §1333 15
16 U.S.C. §1334 .....3, 4, 15
16 U.S.C. §1338 .....3, 15

Wild Free-Roaming Horses and Burros Act, 85 Stat. 649-651, 16 U.S.C. (Supp. III) §1331-1340 2
47-23-1, New Mexico Statutes Annotated (1973 Pocket Supp.) 2, 33
47-23-6, New Mexico Statutes Annotated (1973 Pocket Supp.) 2, 33

OTHER MATERIALS

General Services Administration, Washington, D.C., Inventory Report on Real Property Owned by the United States Throughout the World, June 1974 (Appendix) 6, 17, 31
Hearings on H.R. 795, H.R. 5375 and Related Bills (Protection of Wild Horses on Public Lands) Before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs, 92nd Cong., 1st Sess. (1971) 4, 5, 14, 30, 31
Hearings on S. 862, S. 1116, S. 1090, and S. 1119 (Protection of Wild Horses and Burros on Public Lands) Before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, 92nd Cong., 1st Sess. (1971) 5, 19, 31
House Report 92-480, 92nd Cong., 1st Sess. (1971) 23, 29
Report to Congress by the Secretary of the Interior and the Secretary of Agriculture on Administration of the Wild Free-Roaming Horses and Burros Act (June 1974) 6
Senate Report No. 242, 92nd Cong., 1st Sess. (1971) 24
U.S. Department of Interior, Bureau of Land Management, Washington, D.C., Effects of Livestock Grazing on Wildlife, Watershed, Recreation, and Other Resource Values in Nevada, February, 1975, 35-36 6

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ANSWER BRIEF FOR THE STATE OF NEW MEXICO, ET AL.

OPINION BELOW

The opinion of the three-judge court is not yet reported, and appears at App. A, pp. 1a-6a.

JURISDICTION

Appellees (hereinafter, "the State") are satisfied with Appellant's (hereinafter, "the Secretary") presentation of the jurisdiction of this Court, which jurisdiction is not questioned by the State.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The State is satisfied with the Secretary's presentation of statutes and Constitutional provisions involved, but would add the following additional:

1. The 10th Amendment of the United States Constitution provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

2. 47-23-1 New Mexico Statutes Annotated provides:

> "Short Title—Purpose. This Act (47-23-1 to 47-23-7) may be cited as 'The Livestock Board Act'. The Livestock Board Act shall be liberally construed to carry out its purposes which are to promote greater economy, service and efficiency in the administration of the laws relating to the livestock industry of New Mexico. (1973 Pocket Supp.)"

3. 47-23-6 New Mexico Statutes Annotated provides in part:

> "Additional Powers of the Board. . . . the New Mexico Livestock Board shall have the following powers:
>
> (1) To exercise general regulatory supervision over the livestock industry of this State in order to protect the industry from theft and contagious or infectious diseases and in order to protect the public from diseased or unwholesome meat or meat products; . . . (1973 Pocket Supp.)"

QUESTIONS PRESENTED

I. Whether the three-judge court correctly held that the Wild Free-Roaming Horses and Burros Act is in excess of the power of Congress under the Property Clause of the United States Constitution, and that the Act may not be sustained as an exercise of the power of Congress under the Commerce Clause of the Constitution.

II. Whether the Act infringes on the sovereignty, legislative authority and Police Powers of the State as attested to by the 10th Amendment of the United States Constitution, and intrudes on the State's trustee powers over resident wild animals.

STATEMENT OF THE CASE

The State deems it necessary to include its own Statement, for purposes of clarification and to set forth certain matters omitted by the Statement of the Secretary.

The Wild Free-Roaming Horses and Burros Act, 16 U.S.C. (Supp. III) 1331-1340 (J.S. App. F., pp. 14a-20a), in addition to asserting exclusive jurisdiction, control and complete regulatory powers over the subject animals, also attempts to regulate non-public lands and in addition any unbranded, unclaimed horse or burro that comes into contact with public lands.[1]

---

1. 16 U.S.C. 1322(2)(b) defines wild free-roaming horses and burros to mean "all unbranded and unclaimed horses and burros on public lands of the United States", regardless of when or for what duration such animal may come in contact with public lands. 16 U.S.C. 1334 extends the Act to include regulation of wild horses and burros on State and private lands. Subdivisions (2) through (6) of Section 8 of the Act (16 U.S.C. 1338) are not limited to the public lands, but apply absolute and complete jurisdiction over the subject animals wherever they may be within the United States.

The burros which are the subject of this litigation were in fact freely roaming upon private, State and federal lands, spending the majority of their time on private land (App. 44-46); although at the moment of capture the animals apparently were on BLM lands.

The Act does not expressly claim true property ownership of the animals, and makes no provision for condemnation of the animals, despite the Act's contradictory claim of broad and sweeping powers of dominion, jurisdiction, control and regulation of the animals, tantamount to ownership.

The Act requires the Secretary to remove the animals from private lands upon notification to the Secretary by the private landowner (16 U.S.C. 1334), but the Secretary in this case failed and refused to remove the subject burros upon such notification (App. 48-49; App. 54-55; p. 2 of the Memorandum Opinion below, J.S. App. A., p. 2a; State's Exhibit 5, App. 33-34, 74-78).

The Act makes no provision for compensation for the extensive property damage upon State and private lands, and to State and private interests, caused by the wild free-roaming horses and burros (App. 49-51; 58-59).[2]

The Act and its legislative history do not make any express finding regarding, nor any reference to, interstate commerce, or any burden or effect thereon. The court below, therefore, held that the Act was not based upon and cannot be sustained as an exercise of Congressional au-

2. See also, Protection of Wild Horses on Public Lands, Hearings on H.R. 795, H.R. 5375 and Related Bills before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs, 92nd Cong., 1st Sess., 64, 69, 73-74, Testimony of the Chief of the United States Forest Service, stating that wild free-roaming horses and burros are particularly destructive of the range, consume feed supplements placed out by private individuals for livestock operations, etc.

thority under the Commerce Clause (J.S. Statement, App. A., pp. 5a-6a). The court properly held that Congress grounded the Act upon the Property Clause of the Constitution (*Id.*, 3a).

The court below conducted an evidentiary hearing at which testimony and other evidence was presented, for presentation of the facts giving rise to this litigation (App. 24-89). The Secretary declined to introduce any evidence at that hearing (App. 60), and now seeks to create a record in this Court by extensive reliance upon the testimony of proponents of the Act during hearings on the Bills, and by reference to a hearing held subsequent to enactment of the Act (Brief for the Secretary, pp. 4-5).

Upon review of the legislative history of the Act and the evidence submitted to the court below, it appears that a basic fact upon which the Act is grounded is erroneous and fails to exist: ". . . that these horses and burros are fast disappearing from the American scene". 16 U.S.C. 1331. The animals in fact proliferate very rapidly (App. 28, 59). Prior to and at the time of passage of the Act, the population of the animals was and has remained stable (or was and is increasing).[3] Prior to passage of the Act, the Bureau of Land Management said that there was, in fact, a need to reduce the population of the subject animals.[4]

The Report to Congress by the Secretary of the Interior and the Secretary of Agriculture, as indicated by the Secretary at p. 5 of his Brief, states that the wild free-roaming horses and burros are not vanishing breeds.

3. Hearings on H.R. 795, H.R. 5375 and Related Bills, *supra*, note 2, at 7, 32, 65, 128, 140.

4. Protection of Wild Horses and Burros on Public Lands, Hearings on S. 862, S. 1116, S. 1090, and S. 1119 before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, 92nd Cong., 1st Sess., 46 (1971).

At page 5 of the Statement, and again at p. 10 of his Brief, the Secretary sets forth statistics regarding numbers of remaining wild horses and burros. Again, the evidence introduced below, and in the legislative history, indicates that not only is the population of the subject animals stable or increasing, as set forth above, but that the foregoing statistical evidence is, if not incorrect, at least highly speculative.[5]

The potentially destructive nature of these animals was recognized and dealt with by the Department of Interior itself (Forest Service and Park Service) in March, 1975, when these agencies caused to be destroyed 50 wild

5. The Secretary refers to "85 burros" in New Mexico, Brief for the Secretary at p. 5; and, that less than 10,000 wild horses remain in the entire United States, at note 12, Brief for the Secretary, at p. 10. See, *contra*, Hearings on H.R. 795, H.R. 5375 and Related Bills, *supra*, at 140 (25,000 wild horses in United States), at 7 (17,000), at 128 (15,000 in the State of Nevada alone). And see also, testimony of the Director of the New Mexico Livestock Board in the court below, indicating 5,000 of the subject animals in New Mexico alone, 700 or 800 of which are burros (App. 27, 39). Since 34% of the lands of the State of New Mexico are subject to the Wild Horse Act (Appendix to the June, 1974 Inventory Report on Real Property Owned by the United States Throughout the World, prepared by the General Services Administration, GS 1.15, 1974, 559A), and because these lands are interspersed throughout the State without, for the most part, separation from private or State lands by fencing (App. 44-46, 48, 55), it is apparent that all 5,000 of these New Mexico animals (and all 700 or 800 burros) must be presumed to be within the Act because they may have at one time set foot upon federal lands. The Secretary's note 4 at page 5 of the Brief for the Secretary, indicating that the burros are not subject to federal protection under the Act, is therefore questionable. See also, "Effects of Livestock Grazing on Wildlife, Watershed, Recreation, and Other Resource Values in Nevada," U.S. Department of Interior, Bureau of Land Management, February 1975, at 35-36 (25,000 of the subject animals are in the State of Nevada alone); and, Hearings on H.R. 795, H.R. 5375 and Related Bills, *supra*, at 34, 128-129, stating that the BLM estimates of the animals are inaccurate and the animals are extremely difficult to count; and, Report to Congress by the Secretary of Interior and the Secretary of Agriculture on Administration of the Wild Free-Roaming Horse and Burro Act (June 1974), at 2, stating that the "estimates are open to question".

free-roaming burros upon public lands (Affidavits of Pat Archuleta and Roy G. Gibson, not included in the Appendix herein but in the court record below). There is no evidence in the record herein or in the legislative history of the Act which indicates similar action was ever taken by the State of New Mexico or its citizens.

The State sets forth the foregoing legislative history and three-judge court evidence simply to establish that the Act is based on a legislative declaration of facts which does not exist and which did not exist at the time of passage of the Act; and, to indicate the speculative and questionable nature of the statistics regarding these animals.

The Wild Free-Roaming Horses and Burros Act makes no provision for the prevention or control of disease by and among the subject horses and burros, and the spread of such disease among the livestock industry of this State. The Wild Horse Act prevents the State from protecting its citizens and industry from this evil.

SUMMARY OF ARGUMENT

The State, by its Motion to Dismiss or Affirm previously submitted herein, briefed the merits of this case. The State will attempt to avoid repetition of that brief as much as possible, and respectfully requests the Court to refer thereto for points and authorities not repeated herein. The State by this brief will attempt to answer the points and authorities discussed by the Secretary in his Brief in Chief, and to raise certain new points and authorities not previously briefed by the State's Motion.

The decision of the three-judge court should be affirmed, and the Wild Free-Roaming Horses and Burros Act held unconstitutional.

At pp. 12-13 of his Brief, the Secretary sets forth isolated portions of sentences from previous opinions of this Court as supporting the proposition that Congress' entrusted powers over the public lands is absolute and without limitation, and, that this Court may not say how that trust shall be administered. The Secretary does not mean to imply that this Court may not judicially review Acts of Congress? *Marbury* v. *Madison*, 1 Cr. 137. The issue before this Court calls not for a determination of how or the manner in which a "trust" shall be administered, but rather, whether Constitutional authority exists for Congress to enter into administration of this matter in the first instance. It *is* for this Court to say whether the *subject* of the Act is a proper subject of federal legislation; it *is* for this Court to say whether the Act exceeds the powers of Congress under the United States Constitution; and it *is* for this Court to say whether the Act infringes on powers remaining with the States.

The Secretary does not assert that the lands which are the subject of the Act—all BLM and U. S. Forest Service lands—have been ceded to the federal government by the states; the federal government thereby obtaining absolute and exclusive jurisdiction, dominion and control over the lands by consent of the states. However, should this Court concede the extravagant views of federal power entertained by the Secretary and necessary to the Wild Horse Act, cession by the states of federally-owned lands within their borders would no longer be a prerequisite to such absolute and exclusive federal power over these lands. State laws such as brand inspection laws, animal disease control laws, fish and game laws, estray laws, and even the control of the State over its citizens on federally-owned lands in matters of general criminal and civil law could be taken away and denied the states under the pre-

tense of absolute federal power over federal lands within the State.[6]

On the contrary, federal lands within the borders of the western states are not totally exempt from state legislative and police authority, and the rights of state sovereignty. Every state, upon admission to the Union, acquires general jurisdiction, civil and criminal, for the preservation of public order and for the protection of persons and property throughout the limits of the state, except where the state has ceded exclusive jurisdiction of certain parcels of land to the United States. *Van Brocklin* v. *Tennessee*, 117 U.S. 151, 167; *Wilson* v. *Cook*, 327 U.S. 474, 487-489.

There is no specific delegation of power to Congress to enact the Wild Horse Act; the Act is not a proper exercise of a Constitutional grant of power, upon which every acquisition, holding or disposition of property by the federal government depends. *United States* v. *Allegheny County, Pa.*, 322 U.S. 174.

The State submits that it is for this Court to determine whether the subject animals are a part of the federal soil and thus within the powers of Congress under the Property Clause; or, whether the Act can be sustained as a valid exercise of Congress' powers to protect its lands from damage. The State submits that these questions must be answered in the negative, and that the Act in-

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6. Reference is made to the tables set forth at Appendix A of the Brief of Amicus Curiae, State of Idaho. The federal powers necessary to the Wild Horse Act and claimed by the Secretary in his Brief would reduce the acreage of the State of Alaska by 96.4%; Arizona, by 43.9%; California, by 45%; Colorado, by 36%; Idaho, by 63.7%; Nevada, by 86.5%; Oregon, by 52%; Utah, by 66%; Wyoming, by 48%; and this State, by 33.6%. The United States House of Representatives and the United States Senate would constitute the executive body—the "state legislature"—with regard to these lands "lost" by the western states.

fringes upon the legislative, political and police authority of the states with regard to non-ceded federal lands within state borders. The trustee powers referred to by the Secretary in his Brief rest with the states, unless this Court should now distinguish or overrule its line of decisions holding such trustee ownership powers over resident wild animals to be in the states. *Geer* v. *Connecticut*, 161 U.S. 519; *Lacoste* v. *Department of Conservation*, 263 U.S. 545.

The Act itself and its legislative history fail to make any express reference to "interstate commerce", nor does Congress make any finding, expression of intent, or statement of purpose regarding interstate commerce or any burden or effect thereon. The three-judge court correctly found that the Commerce Clause was not at issue in the case. The Secretary's *post hoc* litigation attempts to raise the Commerce Clause as an issue herein should not be given weight. The legislative history discussed by the Secretary in his Brief does not indicate any reliance by Congress on the Commerce Clause and is inapplicable to the issue. There is no evidence or reference to interstate commerce or any burden or effect thereon in the record herein. The Act itself expressly relies on the powers of Congress over the public lands.

The three-judge court should be affirmed because the Wild Horse Act is based on a legislative declaration of facts that did not exist at the time of consideration and passage of the Act and which does not exist at this time. *Leary* v. *United States*, 395 U.S. 6, 38; *Block* v. *Hirsh*, 256 U.S. 135, 154-155. This Court may examine such facts when legislation is defective on this ground. *Leary, Block, supra*. The legislative history and the evidence introduced in the court below indicate that the population of the subject animals is and has been stable, or is increasing, contrary to the fact upon which the Act expressly grounds

itself: That the subject animals are "fast disappearing from the American scene" (16 U.S.C. 1331). The Act's purpose, and the reason for its enactment, is to prevent the animals from so disappearing.

The State will not herein brief the issue regarding the infringement of the Wild Horse Act upon individual rights and freedoms guaranteed by the United States Constitution. Previous rulings by this Court would perhaps preclude a state from raising, on its own behalf, a violation of such individual rights and freedoms. However, as trustee owner of the subject animals, and because of the State's great interest in the welfare and constitutional rights of its own citizens, the State would show the Court that the Wild Horse Act makes no provision for compensation for the damage caused by the subject animals. This damage occurs on private, state and federal lands, not only to the land itself but to various interests, industries, and persons thereon, and to the State's other resident wild animals. Insofar as the State's lands and other resident wild animals are concerned, the State raises this argument on its own behalf.

The State, by its trustee powers over the subject animals, and under the police powers upon which the Estray Laws of the State are grounded, has authority to grant title and ownership of the subject animals to the citizens of the State. The Secretary acting under the Wild Horse Act then seizes this property from the individual citizens with no provision in the Act for condemnation of the property or compensation therefor.

The extreme federal powers asserted by the Act—that any animal which however briefly may contact federal lands becomes a "federal animal"—have never previously been claimed by Congress nor sustained by this Court.

Even should this Court find Congress to have the power to regulate the subject animals on federal land, the Act unconstitutionally extends its terms to include regulation on state and private lands. The Property Clause powers cannot extend beyond the federal lands in this manner.

The Act makes no provision for controlling or preventing the spread of disease by and among the subject animals, and the spread of such disease to other animals within the State. This is a matter of purely local concern, and constitutes an evil which, under the United States Constitution, should be dealt with by the State under its police powers. By infringing on this area of purely local concern, the Wild Horse Act intrudes upon the local sovereignty and legislative authority of the state, endangering not only the livestock industry and other animals within the state, but also the health and welfare of its citizens.

While the 10th Amendment has been characterized as a "truism", stating merely that all is retained which has not been surrendered, this Court has recently held that the 10th Amendment is not without significance; the Amendment expressly declares the Constitutional policy that Congress may not exercise power in a fashion that impairs the states' integrity or their ability to function effectively in a federal system. *Fry* v. *United States*, ... U.S. ....., at ....., n. 7, 95 S.Ct. 1792, 1795.

This Court, contrary to the claim of power asserted by the Secretary, has ample power to prevent the utter destruction of the State as a sovereign political entity. The Wild Horse Act and any similar extension of the extravagant federal powers necessarily exercised thereby will inevitably cause this destruction, by ousting all sovereignty, control, dominion, legislative authority and police power of the western states over the federal lands within

their borders. In practical effect, the western states will have been drastically reduced in size. Congress by the Wild Horse Act is now declaring that the western states were not in fact admitted into the Union on an equal footing with the original states in all respects whatever, as originally declared by the acts admitting these states into the Union.

ARGUMENT

I. Whether the Three-Judge Court Correctly Held That the Wild Free-Roaming Horses and Burros Act Is in Excess of the Power of Congress Under the Property Clause of the United States Constitution, and That the Act May Not Be Sustained As an Exercise of the Power of Congress Under the Commerce Clause of the Constitution.

Congress by enactment of the Wild Horse Act has unconstitutionally attempted to exercise powers not granted by the Property Clause of the United States Constitution. Congress has no power to legislate in the absence of a specifically enumerated power granted Congress by the provisions of the Constitution itself. *Afroyim* v. *Rusk*, 387 U.S. 253, 257. The authorities discussed by the Secretary at pp. 12-13 of his Brief shed no light on the issues to be determined herein. The animals which are the subject of the Wild Horse Act are not "public land" and are not "public property entrusted" to Congress (*United States* v. *San Francisco*, 310 U.S. 16, 29, et al., at p. 12 of the Brief for the Secretary; *United States* v. *San Francisco, supra*, 310 U.S. at 30, at p. 13 of the Brief for the Secretary).

The subject animals do not issue from the soil comprising the public lands, as did the water power created by

a government dam and the electric energy thus produced, in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288; and *Utah Power and Light Co.* v. *United States*, 243 U.S. 389.

The Secretary's reliance upon the principles established by this Court in *Missouri* v. *Holland*, 252 U.S. 416, is misplaced in that the decision was based upon the federal treaty power as related to internationally migratory birds. There exists no federal treaty regarding the animals which are the subject of the Wild Horse Act, and there is no legislative history or evidence in the record below which indicates these animals to be internationally migratory. The legislative history and the evidence herein is to the contrary.[7] There is no Congressional finding nor any evidence to indicate that the Wild Horse Act is aimed at protecting federal lands from damage by the subject wild horses and burros. The statute is aimed at protecting the wild horses and burros, not the land upon which they live. Therefore, the decisions of this Court holding that the federal government may undertake reasonable steps necessary to protect its lands from injury, including injury caused by animals on such lands, are not authority to support the Wild Horse Act (*Hunt* v. *United States*, 270 U.S. 96, 100; *Camfield* v. *United States*, 167 U.S. 518, 524). This power is directed solely to the federal government's protection of its own lands (*Camfield, supra*, at 525-526).

This Court has stated that the Property Clause ". . . clearly does not grant to Congress any legislative control over the states, and must, so far as they are concerned, be limited to authority over the property belonging to the

7. Testimony of the Director of the New Mexico Livestock Board, App. 29; see also, Hearings on H.R. 795, H.R. 5375 and Related Bills, *supra*, at 35, indicating the animals are non-migratory and remain in "small environmental niches".

United States within their limits." *Kansas* v. *Colorado*, 206 U.S. 46, 89.

The authorities discussed by the Secretary at pp. 12-19 of his Brief do not establish Congress' authority to claim exclusive possession and jurisdiction over, to completely regulate and control, and to assert full powers of dominion, including the right to destroy, the animals which are the subject of the Wild Horse Act. Nor do those cases establish a proprietary interest in the subject animals, such that the animals may be considered "property belonging to the United States". *Kansas* v. *Colorado, supra*. Those cases do not establish the extreme federal power to denote an animal as a "federal animal", or subject the animal to exclusive and complete federal jurisdiction and control, solely upon the basis of a momentary contact of the animal with federal land. On the contrary, those cases must be limited to their factual context—that is, the conditions which Congress may impose upon the *disposal* of federal lands, or the *protection* of federal lands.

Those cases certainly do not extend the terms of the Property Clause so as to enable Congress to enact a statute which also operates upon and regulates private and State lands (16 U.S.C. 1333, 1334, 1338).

Quite simply, horses and burros do not constitute real property, such as the riparian and mineral rights at issue in *Ashwander*, and *Utah Power and Light, supra*. The animals cannot possibly be considered "property belonging to the United States", as set forth by the Property Clause. Nor is it possible to deduce from the Property Clause the crucial conclusion reached by the Secretary at page 13 of his Brief—that the power to regulate and protect wildlife living on public land necessarily follows therefrom. The State can present this Court with no authority in support

of such a conclusion, and the Secretary cites no authority in support thereof. If it is possible to hold any kind of proprietary or regulatory rights in wild animals, such rights have consistently been held by this Court to exist in the State, as *trustee* owner of the subject animals. *Geer* v. *Connecticut*, 161 U.S. 519; *Lacoste* v. *Department of Conservation*, 263 U.S. 545.

Congress has not previously attempted to so extend its powers under the Property Clause. The Secretary in his Jurisdictional Statement and the State in its Motion to Dismiss discuss various other federal statutes regarding animals. Each of the Acts mentioned by the Secretary is self-cleansing and constitutionally sound, and each such Act will remain unaffected should this Court affirm the judgment below (note 4, the State's Motion to Dismiss or Affirm, at pp. 15-16). With the exception of the Wild Free-Roaming Horses and Burros Act, Congress has meticulously observed the constitutional powers of the states and the constitutional limitations placed on the federal government with regard to resident wild animals, and with regard to non-ceded federal lands within the states' borders.

The overall thrust of the Secretary's Brief is that the Property Clause totally exempts federal lands within state borders from state legislative powers, state police powers, and all rights and powers of local sovereignty and jurisdiction of the states. If the Secretary's premise be accepted, the states (and in particular, the western states) will have been admitted into the Union not as equal members, but as states shorn of a legislative power vested in the original states of the Union, a power resulting from the fact of statehood and incident to its very existence. Every isolated piece of land belonging to the United States would be exempt in this regard from the authority of the State.

Ward v. *Race Horse*, 163 U.S. 504, 514. In effect, this construction of the Property Clause would substantially reduce the size of most of the western states.[8]

This Court, mindful of the place of the States in our Constitutional system, the limitations placed upon the federal government by the Constitution, and the powers of local sovereignty, and legislative control inherent in the states, has resolved close cases in favor of a continuing power on the part of the states to legislate in their customary fields. *South Carolina* v. *United States*, 199 U.S. 437; *Federal Compress and Warehouse Co.* v. *McLean*, 291 U.S. 17; *Townsend* v. *Yeomans*, 301 U.S. 441; *Oregon* v. *Mitchell*, 400 U.S. 112; *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261.

The sovereignty and legislative authority of the States with respect to these federal lands, and the trustee powers of the States regarding the animals themselves, will be discussed at Point II, following.

The three-judge court correctly found that the Wild Horse Act cannot be sustained as an exercise of the power granted Congress by the Commerce Clause. The commerce powers are, quite plainly, not at issue herein. The Wild Horse Act, the findings and preamble thereto, and the legislative history fail to make any reference to or finding regarding the commerce powers, interstate commerce, or any burden or effect thereon. The record herein discloses

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8. The percentage of land owned by the federal government is set forth in the 1974 Inventory Report on Real Property Owned by the United States Throughout the World, prepared by the General Services Administration, G.S. 1.15, 1974, 559A, reproduced in the Appendix to the Brief of Amicus Curiae, State of Idaho. With reference to the western states, the tables indicate federal ownership to be: Alaska—96.4%; Arizona—44%; California—45%; Colorado—36.1%; Idaho—63.7%; Montana—29.6%; Nevada—86.5%; New Mexico—33.6%; Oregon—52.3%; Utah—66.2%; Washington—29.5%; Wyoming—48%.

no evidence of commerce among the states or a burden on such commerce. The Act is expressly grounded on the Property Clause powers, and considers the animals to be a part of the public lands.

Because of the failure of the United States to establish a minimal record below (App. 60), and because of the total absence of any mention of interstate commerce or the commerce powers by the Act itself and its history, the Secretary now relies upon a *post hoc* litigation strategy to create a Commerce Clause issue. The Secretary attempts to do so by gleaning isolated portions of the testimony taken during the hearings conducted by the House and Senate prior to passage of the Act (Brief for the Secretary, pp. 20-23).

The Secretary's extensive reliance upon the legislative history overlooks a well established principle of statutory construction: That the language employed in the statute is the foremost guide to legislative intention. *United States* v. *American Trucking Associations,* 310 U.S. 534, 543, n. 18; *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384, 390-95; *United States* v. *Oregon,* 366 U.S. 643, 648. The three-judge court's review of the Act led it to correctly conclude that ". . . the Congress made no findings to indicate that it was in any way relying on the Commerce Clause in enacting this statute. This argument must fail." (J.S. App. A., pp. 5a-6a). The Act expressly relies on the powers of Congress over the public lands, and makes absolutely no reference, ambiguous or otherwise, to interstate commerce or any effect or burden thereon.

With regard to the Secretary's frequent citation of the hearings, this Court has said that such remarks during the course of legislative *hearings* are not treated as significant expressions of legislative intention. *United States* v. *Wrightwood Dairy Co.,* 315 U.S. 110, 125; *United States* v.

United Mine Workers, 330 U.S. 258, 276-277; *McCaughn* v. *Hershey Chocolate Co.,* 283 U.S. 488, 493-494 and cases cited.

Moreover, the particular portions of the legislative history relied upon by the Secretary do not sustain the contention that the Act is based upon the Commerce Clause or derives any powers therefrom.[9]

For example, the Secretary states that the legislative history discloses certain "connections" with interstate commerce (Brief for the Secretary, at p. 21), as seen by testimony that wild free-roaming horses and burros are objects

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9. The Secretary states at p. 21 of his Brief that the subject animals do range across state lines, and that Congress "was well aware of this", and a Senate hearing citation is given. Even assuming that the subject animals do range across state lines, that clearly does not establish "commerce among the states". And, the fact that Congress was "made aware" of a fact from testimony given in hearing certainly does not show that the Act itself is based upon the Commerce Clause, and Congress made no such finding. With reference to the specific citations, Protection of Wild Horses and Burros on Public Lands, Hearing on S. 862, S. 1116, S. 1090, and S. 1119 before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, 92nd Cong., 1st Sess., 45, 52, 61 and 63 cited by the Secretary, it is noted that: Page 45 of the hearing citation makes no mention of migration, interstate or otherwise; p. 61 of the hearings refers to a few horses "near a border", but makes no mention of interstate migration; p. 63 of the hearings makes no mention of migration, interstate or otherwise. The foregoing citations from the Senate hearing make no mention of interstate commerce, or commerce of any nature. The only evidence introduced on the subject in the court below indicates that the animals are non-migratory and remain in a quite small environmental area (App. 29); Bureau of Land Management testimony before the House indicates the animals remain in small environmental niches, note 7, *supra.* Even assuming that some interstate migration occurs, such interstate movement alone is insufficient to sustain Congress' power to regulate the animals under the Commerce Clause. There is no evidence, legislative history or finding of Congress that such interstate movement (assuming such occurs) has any impact on interstate commerce or on commerce in general, or that such movement constitutes interstate commerce in and of itself. Even should such migration be considered an effect on commerce, such trivial impact on commerce may not be used as an excuse for this broad general legislation. *Maryland* v. *Wirtz,* 392 U.S. 183, 196-197, n. 27.

of interest to amateur students of nature and professional scientists, who travel in interstate commerce to observe and study them. These citations of legislative history pertain solely to hearings conducted by Congress; Congress made no findings pertaining thereto and the Act fails to mention any such effect on interstate commerce.[10]

The Secretary, recognizing the absence of any Congressional findings or express provision within the Act itself pertaining to the Commerce power, or to interstate commerce, argues that such an express finding or statutory language is unnecessary to sustain the Act under the Commerce powers. The Secretary makes reference to *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241, 252-253. The opinion supports the State's position herein. It is irrelevant that Congress did not formally invoke the Commerce Clause by Congressional findings, because the Act at issue in *Heart of Atlanta Motel, Inc.* itself explicitly relied on the commerce powers and invoked those powers. As stated by this Court in that case:

> "Since the Commerce power was not relied on by the Government (discussing an older Supreme Court case)

10. This legislative history, n. 22, Brief for the Secretary, at p. 21, pertains not to the substance of the testimony but rather to the identity of the person giving the testimony. The citations concern the testimony of various scientists, college students, and by Mrs. Velma Johnston, another proponent of the Wild Horse Act. No mention is made at any point in the cited testimony of "traveling in interstate commerce". Because the scientists made a study of the subject animals and testified regarding that study in support of the bill, the Secretary presumes that the scientists (or college students) must have traveled in interstate commerce to make the study. Congress did not so find, and the legislative history does not so state. It would be absurd to suggest that a scientific study made in preparation for testimony in support of a bill constitutes a "Commerce Clause" underpinning for the bill itself. If such an argument were accepted, this Court could sustain any Act of Congress as a proper exercise of its powers under the Commerce Clause, upon a showing by the government that witnesses testifying at the hearings in support of the bill traveled in interstate commerce in order to get to Washington, D. C. to testify.

> and was without support in the record it is understandable that the Court narrowed its inquiry and *excluded the Commerce Clause as a possible source of power.* . . . We, therefore, conclude that the Civil Rights cases have no relevance to the basis of decision *here where the Act explicitly relies upon the Commerce power,* and where the *record is filled with testimony of obstructions and restraints* resulting from the discriminations found to be existing." 379 U.S. at 252 (Emphasis added).

The Act at issue in *Heart of Atlanta,* by its express terms, was carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people. Congress expressly, by the terms of the Act itself, relied upon the commerce power. This Court simply held that Congress may invoke the Commerce Clause by the terms of the Act itself, rather than make formal Congressional findings of interstate commerce prior to passage of the Act. In addition, this Court in the *Heart of Atlanta* case, and in *Katzenbach* v. *McClung,* 379 U.S. 294, made specific reference to a Congressional record "replete with evidence of the burdens" and effects on interstate commerce. The Act which was the subject of this Court's decision in *Perez* v. *United States,* 402 U.S. 146, cited by the Secretary in support of this proposition, contained express provisions pertaining to interstate commerce, and Section 201(a) of Title II of the Act contained the following explicit findings by Congress: "(1) Organized crime is interstate and international in character. . . . (3) Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce."

In each of the decisions of this Court cited by the Secretary in support of his suggestion that the Wild Horse Act is based upon the Commerce Clause, the Act construed by the Court in those cases was sustained upon at least two of the following grounds:

1. The Act itself expressly relied upon the Commerce Clause and referred to either the commerce powers or to interstate commerce (*Perez*; *Heart of Atlanta*; *Katzenbach*);

2. The Act contained express findings indicating reliance by Congress on the Commerce Clause (*Perez*); and,

3. The record of the passage of the Act through each House was replete with evidence of the burdens and effects upon interstate commerce (*Heart of Atlanta*; *Katzenbach*).

Congress made no findings indicating reliance on the Commerce Clause during passage of the Wild Horse Act; the Wild Horse Act fails to make any express reference to the commerce powers or to interstate commerce; the record in this case and the record of the passage of the Wild Horse Act through each House contain no evidence of any burden upon interstate commerce and make no express reference to interstate commerce or the commerce powers. We fail to see the applicability of the decisions of this Court in *Perez, Heart of Atlanta* and *Katzenbach, supra,* except insofar as supportive of the State's position herein.

The Secretary is attributing to Congress a motive or Constitutional underpinning for the Act which fails to be disclosed by the legislative record, by the findings of Congress, by the Act itself, or by the record herein. Whatever trivial impact on commerce may be implied from some

of the testimony cited by the Secretary can certainly not be an excuse for the broad general regulation of state and private activities inherent in the Wild Horse Act. *Maryland* v. *Wirtz*, 292 U.S. 183, 196. The legislative history discussed by the Secretary falls far short of disclosing a "close and substantial relation to interstate commerce" as the foundation for the Wild Horse Act. *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U.S. 453, 466; *Maryland* v. *Wirtz, supra,* at 196.

The Secretary at p. 22 of his Brief discusses the word "Commercialization" used by the House Committee in H.R. Rep. No. 92-480. The Committee was concerned with human exploitation of the animals and not interstate commerce. The Committee makes no mention of the commerce powers or of any burden on interstate commerce, or any effect on commerce. The commerce power cannot come into play where such commercial act does not occur in, affect or burden interstate commerce, particularly where Congress fails to make any finding, statutory provision, or legislative record regarding such burden or effect on interstate commerce. The subject of federal power is still commerce, and not all commerce but commerce with foreign nations and among the several states. *Maryland* v. *Wirtz, supra,* at 196.

It is true that Congress exhibited a concern for the welfare of the wild horses and burros in the reports cited by the Secretary; but it is clear that Congress subsequently attempted to resolve this by an explicit finding that the wild horses and burros were an integral part of the public lands and therefore subject to the regulatory powers of the Property Clause. The conclusion that Congress relied on the Property Clause and not the Commerce Clause is inescapable. It is repeatedly stated throughout the Congressional record that the intent and primary purpose of

the Act was the protection of wild horses and burros from man; and this was to be accomplished by considering the animals an integral part of the natural ecological system of the public lands (S. Rep. No. 242, 92nd Cong., 1st Sess., at 1 (1971)).

II. Whether the Act Infringes on the Sovereignty, Legislative Authority and Police Powers of the State As Attested to by the 10th Amendment of the United States Constitution, and Intrudes on the State's Trustee Powers Over Resident Wild Animals.

Absent state consent by complete cession of jurisdiction of lands to the United States, exclusive jurisdiction does not accrue to the federal landowner with regard to federal lands within the borders of the state. As stated by this Court in *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 650: "It is not unusual for the United States to own within a state lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the state. On the contrary, the lands remain part of her territory and within the operation of her laws, save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal." (Emphasis added); see also, *Colorado* v. *Toll*, 268 U.S. 228.

The State and the other western states have made no such cession or consent with respect to the lands which are the subject of the Wild Free-Roaming Horses and Burros Act. The Act, therefore, infringes on the local sovereignty and legislative authority of the states, and on the states' powers inherent in their trustee ownership of resident wild animals.

In *Wilson* v. *Cook*, 327 U.S. 474, this Court upheld an Arkansas tax on the severance of timber from public lands

held by the United States as original owner (federal lands within the borders of the State of Arkansas). Portions of the Court's opinion refute the position taken by the Secretary herein:

> "Since the United States did not purchase the lands with the consent of the state, it did not acquire exclusive jurisdiction under the Constitutional provision, and *there has been no cession of the jurisdiction by the state*. (Omitting additional citations) . . . it follows that the state has retained its legislative jurisdiction, which it acquired by statehood, over public lands within the state, which have been included within the forest reserve.
>
> We conclude that the state has legislative jurisdiction over the federal forest reserve lands located within it, whether they were originally part of the public domain of the United States, or were acquired by the United States by purchase, . . ." 327 U.S. at 487-488 (Emphasis added).

Upon admission of a state to the Union, the state acquires sovereignty and political dominion over the federal lands within the state's borders; and with reference to such lands, the state has the same authority and jurisdiction which she could have exercised over similar property held by private parties. *Fort Leavenworth R. Co.* v. *Lowe*, 114 U.S. 525, 526.

As he must, the Secretary concurs at pp. 7-8 of the Jurisdictional Statement that the federal government has, with respect to non-ceded federal lands, the rights of an ordinary proprietor; and in the words of this Court *only* and *simply* that of an ordinary proprietor. *Paul* v. *United States*, 371 U.S. 245, 264. See also, *Sinclair* v. *United States*, 279 U.S. 263, 297; *Camfield* v. *United States, supra; Fort*

Leavenworth R. Co. v. *Lowe, supra; Alabama* v. *Texas,* 347 U.S. 272. The federal lands are subject to the legislative authority and control of the states equally with the property of private individuals.

The jurisdiction and legislative authority over the public lands, which upon admission to the Union is retained by the States, necessarily includes the power to regulate and control the wildlife living therein. *Geer* v. *Connecticut, supra; Lacoste* v. *Department of Conservation, supra.* As an *ordinary proprietor,* the United States is subject to the same game and fish laws and estray laws as any other private landowner—the laws of the State. *Camfield, supra; Fort Leavenworth R. Co.* v. *Lowe, supra; Sinclair* v. *United States, supra.*

In the case of *Colorado* v. *Toll,* 268 U.S. 228, the federal park service took a position similar to that taken by the Secretary herein, alleging that the Property Clause gave the United States full authority and power over all highways within Rocky Mountain National Park, to the exclusion of the State. This Court examined the legislation and determined that there was no attempt to give exclusive jurisdiction of the lands to the United States, ". . . but on the contrary the rights of the state over the roads are left unaffected in terms. Apart from those terms the state denies the power of Congress to curtail its jurisdiction or rights without an act of cession from it and an acceptance by the national government. . . . (omitting citations). The statute establishing the park would not be construed to attempt such a result. . . . As the defendant is undertaking to assert exclusive control and to establish a monopoly in a matter as to which, if the allegations of the bill are maintained, the State has not surrendered its legislative power, a cause of action is disclosed . . . . The cases cited for the defendant do not warrant any such extension of

the power of the United States over land within a state." 268 U.S. at 230-231.

Paraphrasing the Court above, there was no cession or consent by New Mexico giving exclusive jurisdiction to the United States of the federal lands which are the subject of the Wild Horse Act, and in the words of the Court, "on the contrary, the rights of the State over (wild horses and burros) are left unaffected in terms". The Wild Horse Act undertakes to "assert exclusive control and to establish a monopoly in a matter as to which (New Mexico) has not surrendered its legislative power". 268 U.S. at 231.

We believe it unnecessary for the Court to reach the matters discussed in Point II, since the Act is unconstitutional as an exercise of powers not delegated to Congress under the Property or Commerce Clauses. However, the intrusion of the Act upon the sovereignty of the states, including the intrusion of the Act upon the legislative authority and political jurisdiction retained by the states over non-ceded federal lands within their borders, provides an independent basis for affirming the court below. Adequate constitutional ground for the decision below also exists in the sovereign powers of the states inherent in their trustee ownership of resident wild animals.

The State submits that this inherent trustee power over resident wild animals supports the decision below on two grounds: The subject of the Act is a matter which is necessarily included within the states' legislative authority and political jurisdiction over non-ceded federal lands within state borders, and it is a matter as to which New Mexico has not surrendered its legislative power; and secondly, the Act's intrusion upon these inherent trustee-ownership powers and jurisdiction of the State, alone, supports the decision below.

"The wild animals within its borders are, *so far as capable* of ownership, owned by the state in its sovereign capacity for the common benefit of all of its people. Because of such ownership, *and in the exercise of its police power*, the state may regulate and control the taking, subsequent use and property rights that may be acquired therein" (*Lacoste* v. *Department of Conservation*, 263 U.S. 545, 549). "The adjudicated cases recognizing the right of the states to control and regulate the common property in game are numerous" (*Geer* v. *Connecticut*, 161 U.S. 519, 528). For this purpose the State represents its people (*McCready* v. *Virginia*, 94 U.S. 391, 394).

More recently, the Court has reaffirmed the continuing vitality of *Geer, Lacoste*, et al. by describing the foundation of the state powers with regard to wild animals as follows: "The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a state have the power to preserve and regulate the exploitation of an important resource." *Toomer* v. *Witsell*, 334 U.S. 385, 402.

Although not true technical ownership in the sense of a "titled" property interest, the state has consistently been held by this Court to have police powers, *trustee-ownership*, and the power to regulate and control these animals. It is precisely these trustee powers, police powers, and powers of regulation and control which are now claimed by the Wild Horse Act. When read as a whole, the Act goes even further by, in effect, claiming ownership of these animals without condemnation.

It has been intimated that the *Geer* doctrine is inapplicable herein because the subject horses and burros are not "wild animals" (Brief of Amicus Curiae International Assoc. of Game, Fish and Conservation Commissioners on the Merits, November 20, 1975). However, a committee

finding, not merely testimony taken during hearings, states that Congress did treat the animals as "wildlife". The House Committee expressly found, as follows: ". . . the Committee recognizes that they (the wild horses and burros) should not, in certain management practices, be considered any differently from other species more normally considered as 'wildlife' " (H.R. Rep. No. 92-480, 92nd Cong., 1st Sess. (1971), at page 5). Notwithstanding, the fact that such animals may be "quasi-wild" rather than "wild" is irrelevant insofar as Congress' surpassing its powers under the Property Clause, and Congress' infringing on state sovereignty and legislative authority. The Property Clause and the decisions construing it do not make or support any distinction between Congress' powers over "wild" animals as opposed to its powers over "quasi-wild" animals. No such distinction is supported by the 10th Amendment, nor by the opinions of this Court sustaining the inherent state legislative authority and political jurisdiction over non-ceded federal lands. For that matter, "quasi-wild" animals probably do come within the principles established by this Court in *Geer, Lacoste* and *Toomer*, et al. As found by the House Committee, the animals should not be considered any differently from other species normally considered as wildlife.

State legislative authority over the animals is also derived from its police power. "Aside from the authority of the State, derived from the common ownership of game and the trust for the benefit of its people which the State exercises in relation thereto, there is another view of the power of the State in regard to the property in game, *which is equally conclusive*. The right to preserve game flows from the existence in the State of a *police power* to that end. . . ." *Geer, supra*, 161 U.S. at 534 (Emphasis added). In the words of Justice Frankfurter, ". . . the State may for the common good exercise all the authority

that technical ownership ordinarily confers" in such animals. *Toomer, supra,* 334 U.S. at 408 (concurring opinion).

We would also submit that the legislative history of the Act and the evidence in the record herein show that the basic legislative declaration of fact upon which the Act is grounded is invalid, and does not exist, and did not exist at the time of consideration and passage of the Act. This Court has held that an Act of Congress is invalid if based on a legislative declaration of facts which fails to exist, and the Court in such cases has examined the facts to make that determination. *Leary* v. *United States,* 395 U.S. 6, 38; *Block* v. *Hirsh,* 256 U.S. 135, 154-155. The Act is based on a declaration that the subject animals are "fast disappearing from the American scene" (16 U.S.C. 1331). The purpose of the Act is to prevent the animals from so disappearing.

During the Committee hearings on the Act, and at the time of passage of the Act, the population of the animals was, in fact, stable, and has remained stable.[11]

The uncontroverted evidence before this Court indicates that the animals proliferate very rapidly; in fact, they may double their population every three years (testimony of Lee Garner, Director of the New Mexico Livestock Board, App. 28; testimony of Ruben E. Pankey, a member of the Public Lands Committee of the American National Cattlemen, immediate past Chairman of the Forest Committee and present member of the Legislative Committee of the American National Cattlemen, and Vice-Chairman of the Public Land Committee, New Mexico Cattlegrowers, App. 59).

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11. Hearings on H.R. 795, H.R. 5375 and Related Bills, *supra,* note 2, at 7, 32, 65, 128, 140. The testimony at pp. 7 and 32 of the hearings indicates the population of the animals to be *increasing.*

The Secretaries of Interior and Agriculture reported to Congress that the wild free-roaming horses and burros are not vanishing breeds (Report to Congress by the Secretary of the Interior and the Secretary of Agriculture on Administration of the Wild Free-Roaming Horses and Burros Act, June, 1974).

And the Bureau of Land Management, reporting to the Senate Committee prior to enactment of the Act, stated that there was a need to *reduce* the population of the subject animals.[12]

The basic legislative declaration of fact upon which the Act is grounded did not and does not exist, and the Act is therefore invalid (the horses and burros are not "fast disappearing from the American scene") *Leary, Block, supra.*

The Act contains yet another constitutional defect. The legislative record and the uncontroverted evidence below establish that the subject animals: (1) Cannot peacefully coexist upon the same lands with domestic livestock, and often attack and injure domestic livestock on State and private lands, and on federal lands leased from the government under the Taylor Grazing Act (App. 49-51; 58-59); (2) the horses and burros are particularly destructive of the range, to the detriment of livestock and other wildlife.[13]

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12. Protection of Wild Horses and Burros on Public Lands, hearings on S. 862, S. 1116, S. 1090, and S. 1119 before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, 92nd Cong., 1st Sess., 46 (1971).

13. Protection of Wild Horses on Public Lands, Hearings on H.R. 795, H.R. 5375 and Related Bills, *supra,* note 2 at pp. 64, 69, 73-74. The testimony of the Chief of the United States Forest Service also indicates that the wild, free-roaming horses and burros consume commercial feed supplements purchased by private individuals. The Secretary can himself also attest to the

(Continued on following page)

Because of the mixed nature of the lands in the western States, unseparated by fencing or otherwise, the animals which are the subject of the Act are free to roam upon private, State and federal lands. That is the situation which gave rise to this litigation (App. 44-46, 48, 55; State's Exhibit 7, App. 45, 81; State's Exhibit 5, App. 33-34, 74-78).

As indicated by the legislative record and by the evidence introduced below, the subject animals can and do cause extensive property damage upon State, private and federal lands; not only damaging the lands but also private individuals, other wildlife within the State, and private industry. This damage will occur even if the Act is administered by the Secretary according to its terms. The Act makes no provision for compensation of the State or its citizens for these losses. In fact, as previously submitted hereinabove, the Act itself effectively accomplishes a taking without compensation (the subject horses and burros themselves).

The State submits that this Court may take judicial notice of the fact that the subject horses and burros, as any animal, are subject to contracting and spreading contagious or infectious diseases. The New Mexico Livestock Board was created to protect the citizens of this State from such contagious or infectious diseases among animals (47-23-1 and 47-23-6 N.M.S.A., reproduced *supra*, at page 2). The State, under its estray and other animal laws, and by authority of the United States Constitution, has the respon-

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Footnote Continued—

potentially destructive nature of these animals, as indicated by the March 1975 incident in which the Forest Service and Park Service found it necessary to destroy 50 wild free-roaming burros in Bandelier National Park (Affidavits of Pat Archuleta and Roy G. Gibson, not included in the Appendix herein but in the Court record below).

sibility and the inherent police power to regulate and control these horses and burros to prevent the damage discussed above, and to prevent the spread of contagious or infectious diseases by and among the subject animals. The State must have authority to prevent the spread of such disease from the wild horses and burros to the livestock industry, and to protect the life, health, welfare and property of its citizens.[14]

CONCLUSION

The decision below should be affirmed for the reasons stated above. The application of the Act to federal lands unconstitutionally exceeds the powers of Congress under the Property Clause. The Act by its express terms extends its exclusive jurisdictional and regulatory powers to private and State lands and interests. And as seen above, the Act necessarily has far-reaching and serious inherent effects on State and private interests, which effects occur both upon and beyond the federal lands. The Act thereby infringes on individual rights and freedoms and on the sovereignty, legislative authority and police powers of the states.

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14. In *Clason* v. *State of Indiana*, 306 U.S. 439, this Court upheld an Indiana statute regulating the transportation and disposal of carcasses of large animals not slaughtered for human food. The Indiana statute was upheld despite a contention by Mr. Clason (a private individual convicted under the Indiana statute) that the state law infringed upon the powers of Congress under the Commerce Clause and constituted a burden on interstate commerce. The Wild Horse Act does not seek to prevent or in any way regulate this spread of contagious or infectious diseases by or among the horses and burros, or the spread of such disease to the livestock industry or other animals within the State.

The State submits that should this Act be upheld, Congress will be free to claim exclusive jurisdiction and possession and the sole power to regulate, control or destroy any animal which may at any time touch upon the public domain, however briefly. The federal powers necessary to sustain the Act include civil and criminal jurisdiction over persons touching upon federal lands.

Much more than the subject horses and burros is at stake herein. The extravagant federal powers claimed by the Secretary and necessary to sustain the Wild Horse Act would completely abrogate and undermine *all* state laws insofar as the federal acreage within the State is concerned. This result includes non-ceded federal acreage, where the states have not consented to these exclusive federal powers and jurisdiction. The sovereignty and constitutional powers of the states and their citizens would have been dealt a severe blow. The authority of the State to protect the life, health and welfare of its citizens will be severely limited. Extensive damage to state and private interests will occur and will go uncompensated because of the failure of the Act to make provision therefor. The evils inherent in the Act will extend far beyond the federal lands.

The western states in particular will have been admitted into the Union not as equal members, but as states shorn of a legislative power vested in all of the other states in the Union, a power resulting from the fact of statehood and incident to its primary existence. *Ward* v. *Race Horse*, 163 U.S. 504. If, in the words of Justice White in the foregoing opinion, 163 U.S. at 514, ". . . every isolated piece of land belonging to the U. S. as a private owner would be exempt in this regard from the authority of the State," then the western states will have been reduced in size by

the acreage previously indicated herein (*supra*, at pp. 9 and 17), and Congress will become the state legislature as regards the public domain portions of those states.

The various other constitutional infirmities of the Act notwithstanding, perhaps its most serious defect is its ". . . exercise of power in a fashion which impairs the states' integrity or their ability to function effectively in a federal system". (*Fry* v. *United States*, ... U.S. ....., at ....., n. 7, 95 S.Ct. 1792, 1795). These rights of local sovereignty vest in the states and not in the United States. *Van Brocklin* v. *Tennessee*, 117 U.S. 151, 167; *Barney* v. *Keokuk*, 94 U.S. 324.

This Court has ample power and constitutional authority to determine whether the powers of Congress in the enactment of the Wild Horse Act have been exercised in conformity to the Constitution, and to treat the Act as null and void. *Powell* v. *McCormack*, 395 U.S. 486. The Wild Horse Act is a dramatic intrusion upon traditional state sovereignty, jurisdiction and legislative authority, and seriously affects the federal-state balance established by the U. S. Constitution.

Because of the substantial interest of the western state *amici* in this litigation, the State respectfully requests the Court to give due consideration to the Brief filed herein by Idaho, Nevada, Wyoming, the Nevada Central Committee, the Nevada Board of Agriculture, the Duckwater Shoshone Tribe, and the Pacific Legal Foundation of California.

Should the Court decide to reverse the decision of the three-judge court, the State respectfully requests the Court to remand this cause to the three-judge court for determination of the State's Second Cause of Action, which was

not reached by the court below because of its ruling on the State's First Cause of Action.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1975

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR,
APPELLANT
v.
STATE OF NEW MEXICO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

REPLY BRIEF FOR THE SECRETARY OF THE INTERIOR

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INDEX

	Page
Camfield v. *United States*, 167 U.S. 518	5
Chalk v. *United States*, 114 F. 2d 207, certiorari denied, 312 U.S. 679	1
Champion v. *Ames* (The Lottery Case), 188 U.S. 321	12
Clark v. *Paul Gray, Inc.*, 306 U.S. 583	10
Collins v. *Yosemite Park Co.*, 304 U.S. 518	3
Colorado v. *Toll*, 268 U.S. 228	6
Daniel v. *Family Security Life Insurance Company*, 336 U.S. 220	11
Fort Leavenworth R.R. v. *Lowe*, 114 U.S. 525	2
Hagans v. *Lavine*, 415 U.S. 528	13
Hardware Dealers Mutual Fire Insurance Company v. *Glidden Company*, 284 U.S. 151	11
James v. *Dravo Contracting Co.*, 302 U.S. 134	3
Langford v. *Monteith*, 102 U.S. 145	2
Mason Co. v. *Tax Commission of Washington*, 302 U.S. 186	5
McCulloch v. *Maryland*, 4 Wheat. 316	6, 8
McDonald v. *Board of Election Commissioners of Chicago*, 394 U.S. 802	11
McKelvey v. *United States*, 260 U.S. 353	8
McVay v. *United States*, 481 F. 2d 615	8
Metropolitan Company v. *Brownell*, 294 U.S. 580	12
Ohio v. *Thomas*, 173 U.S. 276	5
Pacific Coast Dairy, Inc. v. *Department of Agriculture of California*, 318 U.S. 285	3

203-182—76——1

	Page
Paul v. *United States*, 371 U.S. 245	2, 3
Penn Dairies, Inc. v. *Milk Control Commission of Pennsylvania*, 318 U.S. 261	5
Siebold, Ex parte, 100 U.S. 371	6
Surplus Trading Company v. *Cook*, 281 U.S. 647	5
Thornton v. *United States*, 271 U.S. 414	12
United States v. *Carolene Products Company*, 304 U.S. 144	11, 12
United States v. *Darby*, 312 U.S. 100	12
United States v. *Mississippi Tax Commission*, 412 U.S. 363	2
United States v. *National Dairy Corporation*, 372 U.S. 29	11
United States v. *San Francisco*, 310 U.S. 16	8
Utah Power & Light Co. v. *United States*, 243 U.S. 389	3
Van Brocklin v. *Tennessee*, 117 U.S. 151	6, 7
Wilson v. *Cook*, 327 U.S. 474	7
Constitution and statutes:	
Constitution of the United States:	
Article I, Section 8, Clause 17	2, 3, 6
Article I, Section 8, Clause 18	8
Wild Free-Roaming Horses and Burros Act, 85 Stat. 649–651, 16 U.S.C. (Supp. IV) 1331–1340:	
Section 1, 16 U.S.C. (Supp. IV) 1331	9, 10
Section 2, 16 U.S.C. (Supp. IV) 1332	8
Section 3, 16 U.S.C. (Supp. IV) 1333	8
Section 3(b), 16 U.S.C. (Supp. IV) 1333(b)	10
Section 3(c), 16 U.S.C. (Supp. IV) 1333(c)	10
Section 5, 16 U.S.C. (Supp. IV) 1335	13
Section 10, 16 U.S.C. (Supp. IV) 1340	10
42 U.S.C. 1983	13
42 U.S.C. 1985	13

Miscellaneous:	Page
Hearings on H.R. 795, H.R. 5375 and Related Bills (Protection of Wild Horses on Public Lands) before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs, 92d Cong., 1st Sess. (1971)	9, 10
71 I.D. 469	8
Jurisdiction Over Federal Areas Within the States, Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, Part II, A Text of the Law of Legislative Jurisdiction 3 (1957)	2

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1. Appellees claim (Br. 8–9, 24–27) that the Wild Free-Roaming Horses and Burros Act is beyond Congress' powers under the Property Clause because the State of New Mexico has not ceded legislative jurisdiction over the federal lands in question to the United States. Apparently the argument is this: if the United States had exclusive legislative jurisdiction over the federal lands, the State could not enforce its estray laws[1] in these areas;[2] therefore, in the absence of such exclusive federal jurisdiction, Congress

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[1] J. S. App. 21a.

[2] See, *e.g.*, *Chalk* v. *United States*, 114 F. 2d 207 (C.C.A. 4), certiorari denied, 312 U.S. 679.

has no authority to legislate with respect to federal lands, at least when such federal legislation would be inconsistent with state law; the Act in question is therefore unconstitutional.

Appellees' argument confuses Congress' derivative legislative powers, which are not involved in this case, with its powers under the Property Clause, which are involved here. As to the former, the United States may acquire derivative legislative powers from a State by consensual acquisition of land pursuant to Article I, Section 8, Clause 17 of the Constitution[3] (see, *e.g., United States* v. *Mississippi Tax Commission,* 412 U.S. 363, 369–370); or by a nonconsensual acquisition followed by the State's subsequent "cession of legislative authority and political jurisdiction" over the land (*Fort Leavenworth R.R.* v. *Lowe,* 114 U.S. 525, 541–542; *Paul* v. *United States,* 371 U.S. 245, 264).[4] In either situation the legislative jurisdiction acquired may range across a broad spectrum, from

[3] This provides that Congress shall have power: "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings * * *."

[4] A third, less common means to possession of such authority is by reservation by the United States of legislative jurisdiction over certain areas in connection with the admission of a State into the Union. See *Langford* v. *Monteith,* 102 U.S. 145; *Fort Leavenworth R.R.* v. *Lowe,* 114 U.S. 525, 526; *Jurisdiction Over Federal Areas Within the States,* Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, Part II, A Text of the Law of Legislative Jurisdiction 3 (1957).

exclusive federal jurisdiction, with no residual state police power (*e.g., Pacific Coast Dairy, Inc.* v. *Department of Agriculture of California,* 318 U.S. 285), to concurrent or partial federal legislative jurisdiction, which may allow the State to exercise certain authority, such as the taxation of property (*e.g., Paul* v. *United States, supra; Collins* v. *Yosemite Park Co.,* 304 U.S. 518; *James* v. *Dravo Contracting Co.,* 302 U.S. 134, 147–149).[5]

Although the federal government's acquisition of derivative jurisdiction in an area can affect the State's power to legislate with respect to it,[6] the power of Congress to legislate under the Property Clause is in no way affected. The Court explained this in *Utah Power & Light Co.* v. *United States,* 243 U.S. 389, 403–405,[7] from which we quote at length:

[5] As the Court explained in *Paul* v. *United States, supra,* 371 U.S. at 264–265: "Thus if the United States acquires with the 'consent' of the state legislature land within the borders of that State by purchase or condemnation for any of the purposes mentioned in Art. I, § 8, cl. 17, or if the land is acquired without such consent and later the State gives its 'consent,' the jurisdiction of the Federal Government becomes 'exclusive.' * * * In either event——whether the land is acquired by purchase or condemnation on the one hand or by cession on the other—a State may condition its 'consent' upon its retention of jurisdiction over the lands consistent with the federal use."

[6] Of course, if the federal government has acquired exclusive jurisdiction under Article I, Section 8, Clause 17 of the Constitution, this "bars state regulation without specific congressional action." *Paul* v. *United States, supra,* 371 U.S. at 263.

[7] In that case the United States sued to enjoin the continued occupancy by the power company of lands the federal government owned but over which it had not acquired derivative legislative jurisdiction.

The first position taken by the defendants is that their claims must be tested by the laws of the State in which the lands are situate rather than by the legislation of Congress, and in support of this position they say that lands of the United States within a State, when not used or needed for a fort or other governmental purpose of the United States, are subject to the jurisdiction, powers and laws of the State in the same way and to the same extent as are similar lands of others. To this we cannot assent. Not only does the Constitution (Art. IV, § 3, cl. 2) commit to Congress the power "to dispose of and make all needful rules and regulations respecting" the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired. True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them. Thus while the State may punish public offenses, such as murder or larceny, committed on such lands, and may tax private property, such as live stock, located thereon, it may not tax the lands themselves or invest others with any right whatever in them. * * * And so we are of opinion that the inclusion within a State of

> lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power. "A different rule," as was said in *Camfield* v. *United States,* [167 U.S. 518, 526], "would place the public domain of the United States completely at the mercy of state legislation."[8]

In short, Congress' power over federal lands is derived from the Property Clause and does not turn upon the degree to which a State may have relinquished its own police powers. See, in addition to the cases cited above, *Penn Dairies, Inc.* v. *Milk Control Commission of Pennsylvania,* 318 U.S. 261, 269.[9] Con-

[8] See also *Mason Co.* v. *Tax Commission of Washington,* 302 U.S. 186, 197, in which the Court upheld state taxation of income earned by contractors engaged by the federal government to build the Grand Coulee Dam (emphasis added): "No question is presented as to the constitutional authority of Congress to provide for this enterprise or to acquire the lands necessary or appropriate for that purpose. There is no contention that the State may interfere with the conduct of the enterprise. *The question of exclusive territorial jurisdiction is distinct.* That question assumes the absence of any interference with the exercise of the functions of the Federal Government and is whether the United States has acquired exclusive legislative authority so as to debar the State from exercising any legislative authority, including its taxing and police power, in relation to the property and activities of individuals and corporations within the territory."

See also *Ohio* v. *Thomas,* 173 U.S. 276, 283.

[9] The cases relied upon by appellees are fully consistent with this view. In *Surplus Trading Company* v. *Cook,* 281 U.S. 647, the

gress' exercise of its Property Clause powers and the State's exercise of its municipal sovereignty may occur simultaneously and harmoniously in the same area; it is not necessary for either sovereign to occupy the field exclusively before it may act. *Ex parte Siebold*, 100 U.S. 371, 392–395. But when there is a conflict the Supremacy Clause dictates that the powers of the national government are paramount. *M'Culloch* v. *Maryland*, 4 Wheat. 316.

Court ruled simply that a State could not tax activities occurring on lands over which the federal government had exclusive legislative jurisdiction under Clause 17; other federal lands within a State "remain part of her territory and within the operation of her laws, save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal" (281 U.S. at 650).

In *Colorado* v. *Toll*, 268 U.S. 228, the superintendent of the Rocky Mountain National Park had by regulation limited to one company the right to operate automobiles for hire over highways in the park. The statute creating the park, however, had expressly reserved the rights of the State over the roads (228 U.S. at 231), and the state claimed it had never surrendered such rights—an allegation, the Court said, it was entitled to attempt to prove: "As the defendant is undertaking to * * * establish a monopoly in a matter as to which, if the allegations of the bill are maintained, the State has not surrendered its legislative power, a cause of action is disclosed if we do not look beyond the bill, and it was wrongly dismissed" (*ibid.*). At most this case stands for the proposition that the United States may not exercise routine police powers on federal lands when by federal statute those powers have been reserved to the State and the State has not relinquished them. It does not hold that Property Clause powers may not be exercised absent state cession of legislative jurisdiction.

Van Brocklin v. *Tennessee*, 117 U.S. 151, firmly supports our position. There the Court held that all property owned by the United States was exempt from state taxation, even though the

We do not, then, make the claim attributed to us by appellees (Br. 16) "that the Property Clause totally exempts federal lands within state borders from state legislative powers, state police powers, and all rights and powers of local sovereignty and jurisdiction of the states." The constitutionality of the Wild Free-Roaming Horses and Burros Act rests on Congress' power to protect these animals through its plenary authority over the federal lands conferred by the Property Clause, not on the basis that the Clause itself bars the operation of state laws on federal

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State had not acquiesced in the federal acquisition of the property nor ceded exclusive jurisdiction to the United States. The statement by the Court that "the provisions which speak of the exemption of property of the United States from taxation, in the various acts of Congress admitting States into the Union * * * are but declaratory, and confer no new right or power upon the United States" (117 U.S. at 167), was made in answer to the contention that a constitutional immunity from taxation could not have existed if provisions assuring immunity were deemed necessary in various statehood acts; it was meant, in short, to affirm rather than to detract from the federal government's power with respect to the States.

In *Wilson* v. *Cook*, 327 U.S. 474, the Court held simply that a State might assess taxes upon activities on federal land purchased under state and federal statutes recognizing the continuation of such rights in the State; and that similar taxing authority in the State existed over private activities on federal lands which were within the State upon the admission to the Union and over which it had not ceded its legislative powers. The power of the federal government to displace state police powers by appropriate congressional action was not in issue, and the Court was careful to point out that whatever legislative authority the State might possess stopped short of empowering it to act in "conflict with the powers reserved to the United States by the Constitution" (*id.* at 487).

lands.[10] The Act in issue "does not represent an exercise of a general control over public policy in a State[,] but instead only an exercise of the complete power which Congress has over particular public property entrusted to it" (*United States* v. *San Francisco*, 310 U.S. 16, 30).

In exercising that power, Congress had authority under Article I, Section 8, Clause 18 of the Constitution "[t]o make all Laws which shall be necessary and proper for carrying [it] into Execution * * *." The end is legitimate—to manage and control the public lands—and the means adopted to this end are appropriate—regulation of the animals that live and feed upon the public lands. The Constitution requires no more. *M'Culloch* v. *Maryland, supra*, 4 Wheat. at 421.[11]

2. Appellees also assert (Br. 5–7, 10–11, 30–31) that the Wild Free-Roaming Horses and Burros Act

[10] In other words, the "states may prescribe police regulations applicable to public land areas, *so long as the regulations are not* arbitrary, or *inconsistent with applicable congressional enactments.*" *McKelvey* v. *United States*, 260 U.S. 353, 359 (emphasis added).

[11] For reasons similar to those discussed above and in our main brief (pp. 12–20), the Department of the Interior concluded that it was constitutional for the Secretary, pursuant to congressional authorizations, to manage and control resident species of wildlife that inhabit federal lands within the National Wildlife Refuge System, notwithstanding any state laws to the contrary. See 71 I.D. 469 (citing examples).

Also, the Secretary of Agriculture has the power, pursuant to congressional authorization under the Property Clause, to keep animals from entering national forests, *McVay* v. *United States*, 481 F. 2d 615 (C.A. 5), as well as to protect animals such as wild horses and burros that inhabit the national forests. See Sections 2 and 3 of the Act, 16 U.S.C. (Supp. IV) 1332, 1333 (J.S. App. 14a–17a).

is unconstitutional because Congress erred in finding that the animals "are fast disappearing from the American scene" (Section 1, 16 U.S.C. (Supp. IV) 1331).

The short answer to this argument is that Congress' power to protect these animals under the Property Clause may be validly exercised whether the population of wild horses and burros is increasing or decreasing. These animals are part of the public domain and Congress would have no less power to regulate them even if they were flourishing to the extent appellees suggest.

In any event, there was ample evidence before Congress to allow it reasonably to conclude that the animals were in fact decreasing in number.[12] See, *e.g.*, Hearings on H.R. 795, H.R. 5375 and Related Bills (Protection of Wild Horses on Public Lands) before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs, 92d Cong., 1st Sess. 1–2, 7, 11–14, 17, 26–32, 35, 80, 87–88, 101, 103, 134–136, 139–141 (1971) ("Hearings"). To cite but one example, the Department of the Interior advised Congress that a bill authorizing management of wild horses was required "to assure the survival of floundering herds" since "confinement caused by the development of the West has changed the environmental patterns of these animals * * * [and] natural processes have operated to deter the survival of a thriving

[12] We cited in our main brief (p. 5) the evidence in this case and the evidence before Congress during the 1974 oversight hearings indicating, in the words of the state director of the Bureau of Land Management, that in New Mexico wild horses and burros were "proving almost unknown on federal public lands" (App. 83).

population" (Hearings, *supra,* at 7). Congress' agreement with this and other representations that in fact the numbers of wild horses and burros were dwindling is not open to challenge here: "[I]t is not the province of a court to hear and examine evidence for the purpose of deciding again a question which the legislature has already decided." *Clark* v. *Paul Gray, Inc.,* 306 U.S. 583, 594.[13]

Beyond that, Congress also found that wild horses and burros "are living symbols of the historic and pioneer spirit of the West" and that "they contribute to the diversity of life forms within the Nation and enrich the lives of the American people" (Section 1, 16 U.S.C. (Supp. IV) 1331). Appellees do not challenge these findings. Since the animals are "an integral part of the natural system of the public lands" (*ibid.*), they are surely a proper object of Congress' exercise of its Property Clause powers.

3. Appellees contend that the Wild Free-Roaming Horses and Burros Act may not be sustained under the Commerce Clause because Congress did not expressly rely on the Commerce Clause in the Act itself and made no findings indicating such reliance, and because the evidence of the connection between the animals in question and interstate commerce is insufficient.

[13] The Act itself provides for periodic congressional review of its administration. See Section 10, 16 U.S.C. (Supp. IV) 1340, set out in J.S. App. 20a. If particular areas are overpopulated, the Secretary is authorized to take appropriate action to control the wild horses and burros in those areas. Section 3(b) and (c), 16 U.S.C. (Supp. IV) 1333(b), (c), set out in J.S. App. 16a–17a.

In our view, it cannot be fatal to an enactment of Congress otherwise valid under a particular constitutional grant of authority that Congress did not specifically invoke it. There is a "strong presumptive validity that attaches to an Act of Congress" (*United States* v. *National Dairy Corporation,* 372 U.S. 29, 32), so strong that "[l]egislatures are presumed to have acted constitutionally even if the source materials normally resorted to for ascertaining their grounds for action are otherwise silent" (*McDonald* v. *Board of Election Commissioners of Chicago,* 394 U.S. 802, 809; see also *Hardware Dealers Mutual Fire Insurance Company* v. *Glidden Company,* 284 U.S. 151, 158–159). The constitutionality of a given statute is a question of power rather than intent, and if Congress possesses the requisite power to act it does not matter whether that power is acknowledged or overlooked. Cf. *Daniel* v. *Family Security Life Insurance Company,* 336 U.S. 220, 224, and cases cited therein. It follows that, while reference to the Commerce Clause and explicit congressional findings may aid a court in determining whether the powers granted by the Clause have been exceeded, the giving of such assistance is not a necessary prerequisite to the constitutional exercise of Commerce Clause authority. *United States* v. *Carolene Products Company,* 304 U.S. 144, 152.[14]

[14] In that case, involving Congress' power to forbid interstate commerce in adulterated milk, the Court said that "[e]ven in the absence of such aids the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or gen-

The constitutionality of the Wild Free-Roaming Horses and Burros Act under the Commerce Clause thus turns solely upon whether Congress has power to act by virtue of the nexus between the subject matter of the legislation and interstate commerce. "[T]he only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power" (*United States* v. *Darby*, 312 U.S. 100, 120–121). For the reasons stated in our main brief—the commercial exploitation of the animals,[15] the passage between the States of the live animals themselves,[16] and the interstate travel of persons interested in observing them—the effect on interstate commerce is, we submit, sufficient to permit Congress to enact necessary and proper legislation to carry out its powers under the Commerce Clause, and thus the Act may be sustained under that grant of authority as well as under the Property Clause.

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erally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators" (304 U.S. at 152). The principle extends beyond "legislation affecting ordinary commercial transactions," we submit, for "the burden of establishing the unconstitutionality of a statute rests on him who assails it" (*Metropolitan Company* v. *Brownell*, 294 U.S. 580, 584) and that burden cannot be discharged merely by showing that Congress did not invoke or make findings under a constitutional grant of power that has otherwise been validly exercised.

[15] Cf. *Champion* v. *Ames* (The Lottery Case), 188 U.S. 321.

[16] See *Thornton* v. *United States*, 271 U.S. 414, 425 (cattle passing between states constituted interstate commerce even though the passage was not for commercial reasons).

CONCLUSION

For the foregoing reasons, as well as the reasons stated in our opening brief, the judgment of the district court should be reversed.[17]

Respectfully submitted.

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MARCH 1976.

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[17] Appellees included in their complaint a second cause of action, which the three-judge district court did not reach. They alleged that in enforcing the Act the Secretary of the Interior violated 42 U.S.C. 1983 and 1985 and various constitutional amendments, and that there is no conflict between the Act and New Mexico's estray laws since Section 5 of the Act, 16 U.S.C. (Supp. IV) 1335, provides that the validity of private claims to animals subject to the Act are to be judged according to State law. If this Court reverses the judgment below, on remand it will have to be determined whether these allegations present sufficiently substantial constitutional claims as to require that they be decided by a three-judge district court. See *Hagans* v. *Lavine*, 415 U.S. 528.

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Appellees.

On Appeal from the United States District Court for the District of New Mexico

BRIEF OF AMICUS CURIAE HOPE RYDEN

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INDEX

	Page
INTEREST OF AMICUS CURIAE	2
QUESTIONS PRESENTED	2, 3
ARGUMENT	3, 4, 5, 6
THE COMMERCE CLAUSE	6, 7, 8, 9
CONCLUSION	10

CITATIONS

Case	Page
Hunt v. United States, 278 U. S. 96 (1928)	4, 5
Constitution and statute: U. S. Constitution, Property Clause, Art. IV, Sec. 3	2, 3, 4, 5, 6
U. S. Constitution, Commerce Clause, Art. I, Sec. 8	6, 9
Wild Free-Roaming Horses and Burros Act, 85 Stat. 649-651, 16 U.S.C. (Supp. III) 1331-1340	1, 2, 6

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BRIEF OF AMICUS CURIAE HOPE RYDEN

The Amicus adopts the brief of the Appellant and says that at issue in this case is the question of the constitutionality of the Wild Free-Roaming Horses and Bur-

ros Act enacted by the Congress (December 15, 1971) pursuant to Article IV, Section 3 (the "Property Clause") of the Constitution. A copy of the act is set forth in Appendix F of the Appellant's Jurisdictional Statement.

INTEREST OF AMICUS CURIAE

The Amicus is a citizen and resident of the United States. She is a naturalist and has spent many years in studying at first hand the habits of wild horses on public lands that form the subject matter of the "Wild Free-Roaming Horses and Burros Act" and this litigation. She has authored two books on wild horses: "America's Last Wild Horses" (E. P. Dutton, 1970) and "Mustangs: A Return to the Wild" (Viking Press, 1972) and has written an article for the National Geographic Magazine (its issue of January, 1971) titled "On the Track of the West's Wild Horses," as well as other books and magazine articles on wildlife. Her interest as Amicus is on behalf of herself and the tens of thousands of other humanitarian Americans who seek to prevent the slaughter for "pet food and fertilizer" of the wild horses and burros that have sought refuge on the public lands of the United States and who, speaking through their Congress, enacted the "Wild Free-Roaming Horses and Burros Act," which New Mexico and others now seek to have declared unconstitutional.

QUESTIONS PRESENTED

(1) Did Article IV, Section 3, of the United States Constitution (the "Property Clause") give the Congress the right to regulate wildlife in the public lands, and if so:

(2) Was this regulatory power superceded by New Mexico's rights as trustee of the wildlife within its borders or obtained on its admission to the Union?

ARGUMENT

Article IV, Section 3, of the United States Constitution, provides in part:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this constitution shall be construed as to Prejudice any Claims of the United States, or of any particular State."

At the time of the adoption of the "Property Clause," the public lands of the United States were teeming with fish, fowl and wildlife of all kinds. Indeed, the fur alone taken from such lands might well have been worth more than the land itself, and the meat from the wild game was one of the main sources of sustenance for the settlers. It seems inconceivable that the founders of the Constitution were ignorant of the existence of this wildlife on the public lands and therefore made no reference to it in the "Property Clause." It seems equally inconceivable that the founders intended the words "Territory or other Property belonging to the United States" to include only the fee simple title to the land itself (the rocks, soil, water, forests, minerals and vegetation of those lands) to the total exclusion of possibly their most valuable asset, namely, the wildlife. Yet such appears to be the contention of New Mexico and Nevada.

It is true that at the time of the adoption of the "Property Clause," wild animals, birds and fish in their natural state were not subjects of ownership (though they could become such by being reduced to possession) and therefore technically speaking were not "property" either real or personal as defined by law.

However, such a construction is not tenable in view of the clear meaning of the "Property Clause" which grants to the Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Obviously those words refer to the boundaries of the Territory and other Property of the United States and do not confine themselves exclusively to the fee simple title to such lands but on the contrary include Rules and Regulations respecting the wildlife which might be from time to time on those lands.

Having been granted the right to regulate wildlife on the public lands by the Constitution, has Congress lost that right to the State of New Mexico?

As pointed out by the Appellant, this Court in *Hunt v. United States, 278 U.S. 96*, held "that the government's authority over the public lands include the power to manage and control the deer population in the national forests and game preserves." However, New Mexico and Nevada as well as the learned District Judges interpret the Hunt rule as being applicable only in instances when necessary to protect the public lands from damage such as overbrowsing in Hunt with the consequent killing of "valuable young trees, shrubs, bushes and forage plants," and does not extend to protecting wild animals found on the lands.

The converse of the last mentioned interpretation should also be true, that is, the United States has the power to manage and control wildlife on the public lands which acts not to damage the land but to improve the young trees, shrubs, bushes and forage plants by fertilization from the fecal matter and bodies of thousands of wild horses and wild burros as well as to "protect the natural ecological balance of all wildife species which inhabit such lands."

In this connection, it is well known that animals are not an adjunct to, but an integral part of any ecosystem. Through photosynthesis, plants convert the energy of the sun into a form of energy which can be used by animal life. In return, the fecal matter and the ultimate disintegration of animal bodies replenish the soil with those elements that are essential to plant growth. Wherever man interferes with this natural recycling of nitrogen, the soil becomes depleted, and artificial fertilizers must be applied. The Appellees' interpretation that wild fauna on the public lands of the United States should be excluded from the protection of the Federal Government, while admitting that the Federal Government has the right to protect the wild flora on those lands, is, therefore, a specious one. It is the view of the majority of scientists today that ecosystems should be treated as intact units and managed as such.

However, regardless of the interpretation of the Hunt case, it would appear that:

(a) The "Property Clause" granted Congress the power to dispose of and make all needful rules and reg-

ulations respecting the public lands, including the wildlife thereon;

(b) Such delegated power has never been transferred to New Mexico;

(c) New Mexico's claim as trustee of resident wild animals on public lands for the benefit of the people of the State and its police power are second, subordinate, junior and inferior to the paramount power of Congress to make needful rules and regulations respecting the public lands including the wildlife thereon; and

(d) The Wild Free-Roaming Horses and Burros Act enacted by Congress pursuant to the "Property Clause" is constitutional.

THE COMMERCE CLAUSE

Apparently no evidence was introduced before the District Court with respect to the migratory character of wild horses and wild burros.

It is requested that this Court take judicial notice of the migratory habits of those animals.

A typical herd of wild horses is made up of three types of lesser social units. These are: the stallion-dominated-harem, the stud band and the lone animals. In respect to the territoriality of wild horses, the behavior of each of these social units differs.

Members of a stallion-dominated-harem seasonally occupy a home range. During spring and summer, stal-

lions that have gathered harems of mares defend their home ranges from other stallions. Thus the animals maintain space around themselves and (unlike domestic animals) avoid overgrazing the land which supports them. In the fall, however, these small social units abandon their land claims and move to fresh pastures (regardless of state lines) where they often coexist with other stallion-dominated-harems, rotating land use. It is not unusual to see two or three such harems coexisting on common ground from their former haunts.

The stud bands behave differently. A stud band is comprised of surplus males (such a surplus is inevitable where a few males have acquired harems). These surplus horses, being sociable by nature, attach themselves to one another and range far and wide. These stud bands are not territorial and migrate whenever they choose.

The third type—the lone animals—are usually old, defeated stallions who have lost their harems in battle and have been driven onto undesirable sections of land. These loners tend not to move about much. In the winter they will join the herd as it congregates on new ground.

Thus it can be seen that wild horses are not strictly territorial and that their movements are biologically purposeful and guided by inner signals which quite naturally defy state boundaries. While conducting my field studies on wild horses during the years 1968, 1969 and 1970, I encountered several wild horse herds that were occupying two states.

For example, along the Montana-Wyoming border, the Pryor Mountain wild horses inhabit the State of Mon-

tana, but make daily treks to the only available water hole which is located in the State of Wyoming.

Another case of dual state residency came to my attention when I sent queries to Bureau of Land Management offices throughout the West seeking locations of wild horse herds on public lands. In response to my questionnaire, two Bureau of Land Management district offices, one in California and one in Nevada, reported the same band of wild horses to be inhabiting their respective states.

In the Bookcliff Mountains along the Colorado-Utah border, wild horses have long existed on both sides of the state line.

And even on the East coast, wild ponies, descendants of survivors of a 17th Century shipwreck, inhabit both the Maryland and the Virginia sections of Assategue Island.

It has been estimated that in times past some two million wild horses in the same time period roamed the plains and mountains from the Mississippi River to the Pacific Ocean and must have crossed and recrossed the then imaginary state lines. The Indians mounted on the ancestors of the horses in question had the reputation of being among the finest light cavalry in the world and invoked the astonishment and profound respect of the American Cavalry Officers during the Indian wars for their bravery, endurance, dash and the vast distances covered.

Accordingly it would appear that the wild animals mentioned in the Wild Free-Roaming Horses and Burros Act come within the scope of Congress' legislative authority to regulate interstate commerce and should it be decided otherwise and should the judgment of the District Court be affirmed, the meat from their slaughtered bodies soon will be the subject of interstate commerce.

CONCLUSION

The judgement of the District Court should be reversed.

Respectfully submitted,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BRIEF OF AMICUS CURIAE THE HUMANE SOCIETY OF THE UNITED STATES

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TABLE OF CONTENTS

	Page
CONSENT	1
INTEREST OF THE AMICUS CURIAE	2
INTRODUCTION	2
ARGUMENT	3
I. The Power of Congress to Control Use of the Public Lands Includes the Power to Designate Broad Public Uses of the Lands, including the Protection and Management of Wild Horses and Burros	3
II. State Jurisdiction over Wildlife on Federal Lands Artificially Separates Control of Wildlife from Control of Habitat, and, from the Standpoint of Sound Management of Public Lands, is an Unworkable Doctrine	6
III. The Act does not Transmute Wild Horses and Burros into Federal Property Nor Does it Extend Federal Jurisdiction over all Wild Horses and Burros regardless of Origin, thereby staying within Constitutional Limits	7
IV. The Act Constitutionally Applies to General Public Domain. The Alleged Need for Specialized Withdrawal or Reservation has no Basis in Law	10
V. The Act can be Grounded at least in Part upon Inherent Power Residing in the National Sovereign to Deal with Problems of National Scope and Concern	12
CONCLUSION	14

AUTHORITIES CITED

Page

Cases:

Andrews v. Andrews,
188 U.S. 14 (1903) 13

Ashwander v. Tennessee Valley Authority,
297 U.S. 288 (1936) 7

FPC v. Oregon,
349 U.S. 435 (1955) 11

Light v. United States,
220 U.S. 523 (1911) 6

McKelvey v. United States,
260 U.S. 353 (1922) 4

Missouri v. Holland,
252 U.S. 416 (1920) 13

New Mexico v. Morton,
Civil No. 74-127 (D.N.M. Feb. 28, 1975) 7

Regional Rail Reorganization Act Cases,
419 U.S. 102 (1974) 10

Second Employers' Liability Cases,
225 U.S. 1 (1912) 3

Texas Oil and Gas Corp. v. Phillips Petroleum Co.,
277 F. Supp. 366 (W.D. Okla. 1967) 4

United States v. Gratiot,
14 Pet. 526 (1840) 11

United States v. San Francisco,
310 U.S. 16 (1940) 4

Page

Utah Power and Light Co. v. United States,
243 U.S. 389 (1917) 4, 5

Van Brocklin v. Tennessee,
117 U.S. 151 (1886) 4

Constitution, Statutes, Regulations:

U.S. Constitution, Art. IV, §3 2

Bald Eagle Protection Act,
16 U.S.C. §§668 *et seq.* (1970) 13

National Wildlife Refuge System Act,
16 U.S.C. §§668dd *et seq.* (1970) 11

Pickett Act,
43 U.S.C. §§141 *et seq.* (1970) 11

Wild Free-Roaming Horses and Burros Act of 1971,
16 U.S.C. §§1331 *et seq.* (Supp. II, 1972) 8, 9, 13

Wild Free-Roaming Horse and Burro Management Regulations,
43 C.F.R. §§4710 *et seq.* (1974) 9

Congressional Materials:

S. Rep. No. 92-242, 92d Cong. 1st Sess. (1971) 5

Miscellaneous:

Boyd, "Federal Protection of Endangered Wildlife Species", 22 Stan. L. Rev. 1289 (1970) 12

Page

T. Hammond, "The Controversy Over Wildlife Jurisdiction, 1964-1970" (1971) 6

Hart and Wechsler, *The Federal Courts and the Federal System* (1973) 3

H. Ryden, *America's Last Wild Horses* (1970) 12

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BRIEF OF AMICUS CURIAE THE HUMANE SOCIETY OF THE UNITED STATES

CONSENT

The Humane Society of the United States has obtained written consent to file a brief as amicus curiae from Appellant and Appellees, pursuant to Sup. Ct. R. 42 ¶2.

INTEREST OF AMICUS CURIAE

Amicus curiae, the Humane Society of the United States, is a non-profit charitable corporation with principal offices in Washington, D.C. and regional offices throughout the United States. It has active members in every state who share a commitment to the prevention of cruelty to animals, the promotion of all aspects of animal welfare and to the integrity of the natural environment.

The Humane Society of the United States has been actively involved in the problems surrounding wild horses and burros in this country for several years. In 1968, the Society sued the Bureau of Land Management of the Department of the Interior to prevent the mass removal and disposal of the wild horse herds of the Pryor Mountain Range in Montana and Wyoming, a suit which led to the establishment of the Pryor Mountain Horse Sanctuary. In 1973, the Society, as co-plaintiff with the American Horse Protection Association, again sued the Bureau of Land Management in an effort to compel compliance with and enforcement of the Wild Free-Roaming Horses and Burros Act of 1971. The Society has continued to monitor government programs concerning wild horses and burros.

INTRODUCTION

In February, 1975, a three-judge District Court for the District of New Mexico declared the Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. §§1331 *et seq.* (Supp. II, 1972), unconstitutional, ruling that it exceeded the power granted to Congress under Article IV, §3 (the Property Clause) of the Constitution of the United States. Amicus curiae, the Humane Society of the United States,

urges the reversal of that decision and, to that end, respectfully submits the arguments that follow for the Court to consider in addition to those of the Federal Appellant.

ARGUMENT

I

THE POWER OF CONGRESS TO CONTROL USE OF THE PUBLIC LANDS INCLUDES THE POWER TO DESIGNATE BROAD PUBLIC USES OF THE LANDS, INCLUDING THE PROTECTION AND MANAGEMENT OF WILD HORSES AND BURROS.

The limits of Congressional power over federal lands under Article IV, Section 3 of the Constitution, have never been fully defined by this Court. Nor, it is submitted, has Congress ever legislated to the full extent of its powers under the Property Clause. "Federal law is generally interstitial in nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. . . . . Federal legislation, on the whole, has been conceived and drafted on an ad hoc basis to accomplish limited objectives." Hart and Wechsler, *The Federal Courts and the Federal System*, 470-471 (1973). Nevertheless, it is well established that Congressional inaction does not indicate a lack of Congressional power. Congress is under no obligation to legislate in a given field to the full extent of its power. *Second Employers' Liability Cases*, 223 U.S. 1, 54-55 (1912). And the fact that state law has traditionally occupied a field is no bar to Congress belatedly exerting the full extent of its enumerated powers under the Constitution, even though state law may be displaced as a result. Federal law prevails over any conflicting state law under the Supremacy Clause. *Id.*

While it has been said that the power of Congress over the public domain is plenary, exclusive, and without limit (*United States v. San Francisco,* 310 U.S. 16, 29 (1940)) it is apparent that that power must stop short of an assumption of sovereignty over federal lands, sovereignty which is held by the states under the terms of their admission to the Union and under the scheme of our federalism. Conversely, a federal encroachment upon a now-absolute state sovereignty over federal lands is *not* at issue here, for past decisions of this Court have recognized that the states' sovereignty over federal lands is, in effect, a qualified sovereignty resulting from the ownership and presence of the co-existent federal sovereign within state boundaries. State powers of taxation, a sure incident of sovereignty, do not extend over federal land. *Van Brocklin v. Tennessee,* 117 U.S. 151 (1886). State police power is applicable to federal lands only so long as that power does not conflict or is inconsistent with applicable Congressional enactments. *McKelvey v. United States,* 260 U.S. 353, 359 (1922); *see also, Texas Oil and Gas Corp. v. Phillips Petroleum Co.,* 277 F. Supp. 366, 368-369 (W.D. Okla. 1967).

In *Utah Power and Light Co. v. United States,* 243 U.S. 389 (1917), this Court made its most decisive statement on the nature and extent of Congressional power over public lands:

> Not only does the Constitution (art. 4, §3, cl. 2) commit to Congress the power "to dispose of and make all needful rules and regulations respecting" the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court, have gone

> upon the theory that the power of Congress is exclusive, and that only through its exercise in some form can rights in lands belonging to the United States be acquired. True, for many purposes a state has civil and criminal jurisdiction over lands within its limits belonging to the United States, *but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use, and to prescribe in which manner others may require rights in them.*
>
> 243 U.S. at 404 (emphasis added).

It is submitted that the power of Congress to control the "use" of the public lands means more than putting such lands at the disposal of local agricultural or commercial interests for purposes of grazing, mining and so forth. There are broader public uses which are well within the Congressional power both to allow and to effectuate on behalf of the American public, and among such uses is the protection and management of wild horses and burros, which, as the Senate Committee declared, "belong to all of the American people . . . [and] are living symbols of the rugged independence and tireless energy of our pioneer heritage." S. Rep. No. 92-242, 92d Congress 1st Sess. (1971), in *1971 U.S. Code Cong. and Admin. News* 3553.

II

STATE JURISDICTION OVER WILDLIFE ON FEDERAL LANDS ARTIFICIALLY SEPARATES CONTROL OF WILDLIFE FROM CONTROL OF HABITAT, AND, FROM THE STANDPOINT OF SOUND MANAGEMENT OF PUBLIC LANDS, IS AN UNWORKABLE DOCTRINE.

Appellees and the state amici curiae seek to limit congressional control of property belonging to the United States to real property, excluding control of wildlife thereon except for incidental purposes of protecting the land. Appellees and the state amici curiae ground this assertion upon ancient notions of the state as the owner-in-trust of wildlife for the people and of state regulation of wildlife under the police power. Such a bifurcation of wildlife from real property is a concept predating our understanding of the interaction between wildlife and its habitat.

The United States, by exercising its real property rights to which the states presently admit, can manipulate the food supply which the habitat provides and thereby control reproduction rates of the resident wildlife. The United States by exerting its rights as a landowner can, at least in theory, exclude all competing uses such as grazing; it can preclude any harvesting of wildlife by forbidding trespass on its lands. *Light v. United States,* 220 U.S. 523, 536 (1911). All of these actions are, in effect, management or regulation of resident wildlife. T. Hammond, "The Controversy Over Wildlife Jurisdiction, 1964-1970", 15-16 (1971).[1]

[1] Unpublished thesis available through the Colorado Division of Game, Fish and Parks.

Judged from the objective of responsible management of natural resources on federal lands for the general public good, the separation of jurisdiction over wildlife from jurisdiction over land is an unworkable doctrine. What is needed is the unified management of the whole ecology of federal lands. The bifurcation of control which the District Court's decision stands for is as artificial and as absurd both from a practical and legal standpoint, as was the distinction between federal riparian rights and the electricity produced therefrom urged upon this Court in *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288 (1936). It is time to broaden the meaning of the Congressional power to regulate property belonging to the United States within the Property Clause, to take into account contemporary notions of responsible environmental management.

III

THE ACT DOES NOT TRANSMUTE WILD HORSES AND BURROS INTO FEDERAL PROPERTY NOR DOES IT EXTEND FEDERAL JURISDICTION OVER ALL WILD HORSES AND BURROS REGARDLESS OF ORIGIN, THEREBY STAYING WITHIN CONSTITUTIONAL LIMITS.

The three-judge District Court apparently interpreted the Act as converting wild horses and burros into federal property by contact with federal lands. Memorandum Opinion of the Three-Judge District Court, *New Mexico v. Morton,* Civil No. 74-127 (D.N.M., Feb. 28, 1975), reprinted in Appellant's Jurisdictional Statement, Appendix A, p. 4a. Similarly, Appellees have contended that the Act asserts exclusive possessory rights to all unbranded horses and

burros regardless of origin, which at any time set foot on federal property, so being "transmuted" into federal property and therefore subject to the Act. Amicus curiae, the State of Idaho, in its brief (at pages 4-5) also described the effect of the Act in the same terms.

Such assertions can only be derived from a strained interpretation of the Act. The law is not an ass (whatever the subject matter of this particular Act may be). The Act nowhere speaks of the animals as federal "property" or deals with them in terms of "ownership". The Act speaks in terms of "jurisdiction", "protection" and "management", all of which are in the nature of regulation, not ownership. And by any reasonable reading, the Act seeks to regulate only those wild free-roaming horses and burros originally residing on public lands as of the date of the Act, and their offspring. The Act's preamble refers to its objects of protection as "integral part(s) of the public lands." 16 U.S.C. §1331 (Supp. II, 1972). Section 2(b) of the Act defines wild free-roaming horses and burros as "all unbranded and unclaimed horses and burros on *public lands* of the United States." 16 U.S.C. §1332 (b) (emphasis added). This definition, of course, must be read into every other clause wherein the term "wild free-roaming horses and burros" appears.

The language of Section 4 (16 U.S.C. §1334), which is as follows:

> Nothing in this section shall be construed to prohibit a private landowner from maintaining wild free-roaming horses or burros on his private lands, or lands leased from the Government, if he does so in a manner that protects them from harassment,

> and if the animals were not willfully removed or enticed from the public lands. Any individuals who maintain such wild free-roaming horses or burros on their private lands or lands leased from the Government shall notify the appropriate agent of the Secretary and supply him with a reasonable approximation of the number of animals so maintained.

was certainly meant to deal with the situation where wild free-roaming horses and burros wander off public lands onto private lands.

While wild free-roaming horses and burros retain their character as federal protectees if they wander off federal lands, otherwise private horses and burros, even though unbranded, are not instantly transmuted into federal property or into federal protectees by wandering onto federal lands.[2] Rather, the question of ownership of such horses is left to state substantive law under Section 5 of the Act (16 U.S.C. §1335).

Thus, the extravagant and clearly unconstitutional qualities attributed by Appellees to this Act do not hold up under any reasonable reading and are not in fact part of the law as written. Furthermore, the longstanding policy of this Court is to construe legislation, if consistent with the will of Congress, so as to preserve its constitutionality.

---

[2] The regulations promulgated under the Act by the Bureau of Land Management specifically exclude from the definition of "wild free-roaming horses and burros", "any horse or burro which entered or was introduced onto public lands after December 15, 1971, by accident, negligence, or willful disregard of ownership." 43 C.F.R. §4710.0-5(b) (1974).

Regional Rail Reorganization Act Cases, 419 U.S. 102, 134 (1974).

IV

THE ACT CONSTITUTIONALLY APPLIES TO GENERAL PUBLIC DOMAIN. THE ALLEGED NEED FOR SPECIALIZED WITHDRAWAL OR RESERVATION HAS NO BASIS IN LAW.

Appellees, the State of New Mexico *et al*, contend in their Motion to Dismiss or Affirm (at pages 12-14) that the Act is crucially flawed in that it applies to the general public lands, that is, those which are still subject to sale and general use, rather than to land purchased, withdrawn or reserved as sanctuaries for wild horses and burros; that a "great difference in federal jurisdiction . . . exists between the two categories" of federal lands; and that the present litigation would be unnecessary had Congress instead withdrawn specific parcels of land from the general public domain to be used as horse and burro sanctuaries.

While the authorities cited at pages 13-14 of Appellees' Motion to Dismiss or Affirm admit to the distinction between general public lands and lands withdrawn, reserved or purchased for a particular use, none of those authorities stand for the proposition or hold that Congressional authority under the Property Clause is somehow greater over reserved or withdrawn lands than over general public lands[3] or that the nature of Congressional authority over

[3] The degree of federal jurisdiction over purchased land is not relevant to this discussion since any wild horse or burro sanctuaries would be created from lands already in the public domain.

federal lands vis-a-vis the state police power is in any way different with respect to general public lands than with respect to lands withdrawn or reserved.

Withdrawal or reservation automatically insulates withdrawn or reserved lands from statutes applicable to general public lands, statutes which, but for the withdrawal, would otherwise apply to the withdrawn lands. But withdrawal or reservation alone, without a cession of jurisdiction by the state, does not augment federal jurisdiction or change the nature of Congressional authority under the Property Clause over the withdrawn lands. *See, FPC v. Oregon*, 349 U.S. 435, 448 (1955); *cf., United States v. Gratiot*, 14 Pet. 526, 536-537 (1840).

The statutes enabling withdrawal for special purposes usually provide for quick reclassification back to general use status, belying any magic distinction in jurisdiction resulting from withdrawal. *See, e.g.*, The Pickett Act, 43 U.S.C. §145 (1970) and the National Wildlife Refuge System Act, 16 U.S.C. §668dd(a) (1970).

Furthermore, while Appellees assert that "The purposes of the Act could have been, and can yet be, constitutionally satisfied by withdrawal and reservation of specific parcels of land for wild burro and horse sanctuaries and refuges" (Motion to Dismiss or Affirm, p. 14), they also assert that what really saves existing federal statutes providing for land withdrawal for purposes of wildlife protection is the insertion of "express language maintaining the traditional powers of the states over wild animals upon the federal lands which are the subject of the statute. . ." (Motion to Dismiss or Affirm, p. 15). The idea that reservation or withdrawal of lands is a cure-all in this

controversy is an illusion. If Congress had created wild horse and burro sanctuaries by withdrawing lands but had not inserted a clause reconciling federal property power with the alleged state police power over wildlife, the basis for the present challenge would still exist. More importantly, it should be recognized that the fears expressed by the Federal Appellant at footnote 4, page 9 of its Jurisdictional Statement are justified, that if the Appellees' position is upheld by this Court, several existing statutes (at least, those grounded on the Property Clause) providing for the protection of wildlife on federal lands would be rendered constitutionally unsound whenever their application conflicted with state police regulations.

V.

THE ACT CAN BE GROUNDED AT LEAST IN PART UPON INHERENT POWER RESIDING IN THE NATIONAL SOVEREIGN TO DEAL WITH PROBLEMS OF NATIONAL SCOPE AND CONCERN.

Throughout this century, the federal government has had to deal with wildlife-related problems with which the states have either been unwilling or unable to cope, problems such as the preservation of large tracts of land for park and refuge purposes, comprehensive protection of whole species, and the protection of migratory, interstate waterfowl. Too often the nature of local or state political processes simply precludes the states from assuming adequate and effective responsibility. *See,* Boyd, "Federal Protection of Endangered Wildlife Species", 22 Stan. L. Rev., 1289, 1291, 129ln.16 and 17 (1970), and H. Ryden, *America's Last Wild Horses,* 251-253 (1970). Furthermore, such problems frequently have a national flavor or character

to them and have a gravity and urgency which makes questions of competing state-federal jurisdiction seem inconsequential, such as the preservation of the American bald and golden eagles, effected by the Bald Eagle Protection Act, 16 U.S.C. §§668 *et seq.* (1970).

In the preamble to the Wild Free-Roaming Horses and Burros Act of 1971, Congress found and declared that wild free-roaming horses and burros are an important national resource, "symbols of the historic and pioneer spirit of the West", and, by implication, that preservation of them is an objective of national concern (16 U.S.C. §1331). The Congress has chosen the protective scheme of the Wild and Free-Roaming Horses and Burros Act as the instrument by which this national policy is to be fulfilled. In such circumstances, as Mr. Justice Holmes observed, "it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found . . . . It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act." *Missouri v. Holland,* 252 U.S. 416, 433, 435 (1920) (dictum), *quoting from Andrews v. Andrews,* 188 U.S. 14, 33 (1903).

CONCLUSION

For the foregoing reasons, and for those found in the brief of Appellant, Rogers C.B. Morton, the decision of the United States District Court for the District of New Mexico should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1488

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,
Appellant

v.

STATE OF NEW MEXICO, ET AL.,
Appellees

On Appeal from the United States District Court for the District of New Mexico

BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF GAME, FISH AND CONSERVATION COMMISSIONERS ON THE MERITS

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INDEX

	Page
CONSENT	1
INTEREST OF AMICUS ASSOCIATION	2
STATEMENT OF THE CASE	4
ARGUMENT	4
A. Traditional Doctrines Concerning State Authority Over Wildlife Are Not Involved in This Case	4
B. Provisions of the Wild Free-Roaming Horses and Burros Act Plainly Demonstrate That Horses and Burros Are Not Wildlife	8
C. The Proprietary Interest of the United States Is an Adequate Basis of Authority To Protect Burros Found on the Public Domain	11
CONCLUSION	13

AUTHORITIES CITED

CASES:

Andrews v. Smith, 324 Pa. 455, 188 A. 146 (1936)	6
Camfield v. United States, 167 U.S. 581 (1897)	12
Congress & Empire Spring Co. v. Edgar, 99 U.S. 645 (1879)	6
Fields v. Wilson, 186 Ore. 491, 207 P.2d 153 (1949)	6
Geer v. Connecticut, 161 U.S. 519 (1896)	4, 5, 8, 9
Kansas v. Colorado, 206 U.S. 46 (1907)	12
King v. Arlington County, 195 Va. 1084, 81 S.E. 2d 587 (1954)	8
Maryland Dept. of Natural Resources v. Amerada Hess Corp., 350 F.Supp. 1060 (D. Md. 1972)	5, 8
New Mexico State Game Comm'n v. Udall, 410 F.2d 1197 (10th Cir. 1969)	4, 8
Omaechevarria v. Idaho, 246 U.S. 343 (1918)	8
People v. Dello, 71 N.Y.S. 2d 145 (1947)	6

Page

State ex rel. Sofeico v. Heffernan, 41 N.M. 219, 67 P.2d 240 (1937) 9
Tamburello v. Jaeger, 249 La. 25, 184 So. 2d 544 (1966) 6
Toomer v. Witsell, 334 U.S. 385 (1948) (concurring opinion) 5
United States v. Plott, 345 F.Supp. 1229 (S.D.N.Y., 1972) 4, 5, 8
Utah Power & Light Co. v. United States, 243 U.S. 389 (1917) 11, 12
Yazoo & Mississippi Valley R. Co. v. Gordon, 184 Miss. 885, 186 So. 631 (1939) 6

CONSTITUTION, STATUTES:

U.S. Constitution, Article IV, Section 3, Clause 2 ..3, 4, 11
U.S. Constitution, Article I, Section 8, Clause 3 12

FEDERAL:

§ 1, Multiple-Use Sustained Yield Act of 1960, 74 Stat. 215, 16 U.S.C. § 528 3
§ 4(c), National Wildlife Refuge System Administration Act of 1966, 80 Stat. 927, 16 U.S.C. § 668dd(c) (1970) 2, 3
Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. § 1331-1340 (Supp. II, 1972) 4, 8, 10
§ 5, 78 Stat. 1040, 16 U.S.C. § 460n-4 (1970) 3
§ 6, 79 Stat. 614, 16 U.S.C. § 460o-5 (1970) 3
§ 4, 82 Stat. 904, 16 U.S.C. § 460w-4 (1970) 3

STATE:

Ariz. Rev. Stat. §§ 24-104, 311, 312 (1956) 7
Calif. Food & Agric. Code §§ 35, 16302, 16303, 17091 et seq. (1968) 7
Rev. Codes of Montana, Title 46-1001, 1005 (1947) 7
Nevada Rev. Stat. §§ 569.005, 569.010 (1973) 7
New Mexico Stat. Ann. § 47-14-1 (1953) 8
Oregon Rev. Stat. §§ 607.005, 607.304 (1974 ed.) 7
Utah Code Ann. §§ 47-2-1, 47-2-5 (1953) 7
Wyoming Stat. §§ 11-319, 500 (Cum. Supp., 1975) 7

Page

MISCELLANEOUS:

Hearings on H.R. 795, H.R. 5375 and Related Bills Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs, 92 Cong., 1st Sess. (1971) 9, 10, 11
2 Blackstone, *Commentaries* 6
2 Kent, *Commentaries* 6
McKnight, Feral Livestock in Anglo-America, University of California Press, (1964) 5
Natchtez Trace Parkway, 58 I.D. 467, 472 (1943) (Opinion of Gardner, Solicitor) 12
Pufendorf, Law of Nature and Nations 6

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---

BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF GAME, FISH AND CONSERVATION COMMISSIONERS ON THE MERITS

CONSENT

The International Association of Game, Fish and Conservation Commissioners (hereinafter "the Association") submits this brief amicus curiae having ob-

tained consent of all parties pursuant to Rule 42(2) of the Supreme Court Rules.

INTEREST OF AMICUS ASSOCIATION

The Association is a voluntary, unincorporated association dedicated to coordinating the efforts of public administrative agencies responsible for the protection and management of the fish and wildlife of North America. Founded at Yellowstone National Park in 1902, the Association numbers among its government members the wildlife agencies of all fifty states, five Canadian provinces, the Commonwealth of Puerto Rico, and the Republic of Mexico, as well as the U.S. Fish and Wildlife Service and the Canadian (dominion) Wildlife Service.

With the recent surge of national interest in environmental matters the Congress has been active in enacting legislation relating to fish and wildlife. For historical and policy reasons, as well as reasons rooted in the Constitution's distribution of power between the United States and the several States, Congress has been deferential to state authority and jurisdiction with respect to fish and resident wildlife. In the course thereof Congress has deliberately enacted legislation which reflects a pervasive policy of coordination between federal and state authority over wildlife, including wildlife found on federally owned lands. Thus, for example, in the National Wildlife Refuge System Administration Act of 1966, being an organic act for management of units of federal land in virtually every state set aside primarily as breeding or resting grounds for migratory waterfowl, it is provided:

> The regulations permitting hunting and fishing of resident fish and wildlife within the System shall be, to the extent practicable, consistent with State fish and wildlife laws and regulations. The provisions of this Act shall not be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System.

80 Stat. 927, 16 U.S.C. § 688dd(c). Similarly, in the numerous legislative enactments establishing units of the National Recreation Area System, being a federally owned system of outstanding natural areas designed primarily to meet regional recreation requirements, it is typically provided that hunting, fishing and trapping shall be permitted "in accordance with applicable laws of the United States and the respective states." E.g., § 5, 78 Stat. 1040, 16 U.S.C. § 460n-4 (Lake Mead NRA); § 6, 79 Stat. 614, 16 U.S.C. § 460o-5 (Delaware Water Gap NRA); § 4, 82 Stat. 904, 16 U.S.C. § 460w-4 (Flaming Gorge NRA). Finally, with respect to the National Forests, Congress in the Multiple Use-Sustained Yield Act of 1960 has declared its policy that "the national forests shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes," adding that: "Nothing herein shall be construed as affecting the jurisdiction of the several States with respect to wildlife and fish on the national forests." § 1, 74 Stat. 215, 16 U.S.C. § 528.

The Association's interest herein is thus twofold: (1) to support congressional power in the instant case pursuant to the Property Clause of the Constitution, article IV, section 3, clause 2, to protect animals found on the public domain; and (2) to draw the Court's attention to the firmly established legal distinction

between wildlife and feral animals and the corresponding difference in the measure of State authority over wildlife and feral animals.

STATEMENT OF THE CASE

Amicus Association adopts the Statement as presented by federal appellants in their Brief on the Merits.

ARGUMENT

As Applied in the Instant Case, the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (Supp. II, 1972) Is a Valid Exercise of Authority Under the Property Clause.

A. Traditional Doctrines Concerning State Authority Over Wildlife Are Not Involved in This Case.

In holding unconstitutional the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (Supp. II), the District Court held that the congressional attempt therein to regulate horses and burros on public land conflicted with historical interpretation of the Property Clause of the Constitution, article IV, section 3, clause 2, as well as traditional doctrines concerning wild animals. Relying on *Geer* v. *Connecticut,* 161 U.S. 519 (1896), and *New Mexico State Game Comm'n* v. *Udall,* 410 F.2d 1197 (10th Cir. 1969), cases enunciating the doctrine that wildlife is owned by the state in its sovereign capacity in trust for the benefit of its people, the court held that wild horses and burros do not become "property" of the United States simply by being present on its land.

The ownership doctrine enunciated in *Geer* v. *Connecticut, supra,* remains sound law. *United States* v. *Plott,* 345 F.Supp. 1229 (S.D.N.Y. 1972). As stated by Mr. Justice Frankfurter, "It expressed the momentum of legal history that preceded it, and around it in turn has clustered a voluminous body of rulings." *Toomer* v. *Witsell*, 334 U.S. 385, 408 (1948) (concurring opinion). The ownership doctrine provides authority for the States to protect natural resources other than simply fish and wildlife, see *Maryland Dept. of Natural Resources* v. *Amerada Hess Corp.,* 350 F. Supp. 1060 (D.Md. 1972) (recovery of damages by state for oil spill causing pollution of state waters), and as such provides a fundamental underpinning for natural resource protection by the several states. While the *Geer* doctrine remains sound law, however, amicus submits that it is inapposite to resolution of the instant case because the burros involved herein are feral animals, not wildlife.

Through negligence or mischance, man has been responsible for the accidental introduction of a number of exotic animals in varied parts of the world. Outstanding among these accidental introductions has been the reversion of livestock to a feral existence and on all continents various livestock species have occasionally wandered from confinement and taken to a "wild" life. McKnight, Feral Livestock in Anglo-America, University of California Press 1 (1964). Perhaps the hardiest of all the feral exotics is the "wild" burro (Equus asinus), scattered throughout the western states and descendants of domesticated burros which had been prized by early prospectors and explorers. McKnight, op. cit. supra, at 21.

At common law a distinction was drawn between animals "ferae naturae" and animals "domitae naturae" (sometimes also referred to as "mansuetae

naturae"). "Ferae naturae" are animals which by nature are wild or of a wild nature or disposition as distinguished from "domitae naturae" which are naturally tame animals. The distinction with attendant differences in legal consequences is found crystallized in the classical writers as early as the seventeenth century in Pufendorf's Law of Nature and Nations, Bk. IV, ch. 6, § 5, and is carried forward by Blackstone, 2 Blackstone, Commentaries § 391, and Chancellor Kent. Kent sets forth the common law rule that ownership of domesticated animals is an absolute property right whereas ownership of animals ferae naturae is in no individual and thus is held to be in the state in its sovereign capacity in trust for the benefit of its people. 2 Kent, Commentaries § 347. The distinction is carried forward in the American decisions. E.g., *Tamburello* v. *Jaeger,* 249 La. 25, 184 So. 2d 544 (1966); *Yazoo & Mississippi Valley R. Co.* v. *Gordon,* 184 Miss. 885, 186 So. 631 (1939); *People* v. *Delio,* 71 N.Y.S. 2d 145 (1947); *Fields* v. *Wilson,* 186 Ore. 491, 207 P.2d 153 (1949); *Andrews* v. *Smith,* 324 Pa. 455, 188 A. 146 (1936).

This Court has expressly recognized the distinction between domestic and wild animals and the classification of the horse as a domestic animal, with attendant legal consequences. *Congress & Empire Spring Co.* v. *Edgar,* 99 U.S. 645 (1879). In that case, the Supreme Court cited with approval the common law maxim that an owner of a domestic animal, such as an ox or a horse, would not be deemed negligent and thus liable for injury caused by either, absent a pre-existing knowledge of a propensity for viciousness on the part of the animal. 99 U.S. at 654. However, a person who has lawfully reduced to possession a wild animal would be liable for such injury even absent a pre-existing knowledge of the animal's mischievous nature. Wild animals, unlike domestic species, are presumed to be mischievous.

In these circumstances, therefore, it is not fortuitous that state authority over the burros in the instant case was exercised not by the New Mexico Department of Game and Fish but by the New Mexico Livestock Board. And it is for the same reason, viz., that horses and burros are not considered wildlife, that the statutes of other western states vest authority over estrays in state livestock boards, not in the state wildlife agency. E.g., Ariz. Rev. Stat. §§ 24-104, 311, 312 (1956) (authority vested in Livestock Sanitary Board); Calif. Food & Agric. Code §§ 35, 16302, 16303, 17091 *et seq.* (1968) (authority vested in Department of Food and Agriculture); Rev. Codes of Montana, Title 46-1001, 1005 (1947) (authority vested in livestock commissions); Nevada Rev. Stat. §§ 569.005, 569.010 (1973) (authority vested in State Department of Agriculture); Oregon Rev. Stat. §§ 607.005, 607.304 (1974 ed.) (authority vested in State Department of Agriculture); Utah Code Ann. §§ 47-2-1, 47-2-5 (1953) (authority vested in Boards of County Commissioners); Wyoming Stat. §§ 11-319, 500 (Cum. Supp., 1975) (authority vested in Wyoming Livestock Board). Much as the statutes cited above, the New Mexico statute defines "estray" as:

> Any bovine animals, horse, mule or ass, found running at large upon public or private lands, either fenced or unfenced, in the state of New Mexico, whose owner is unknown in the section where found . . . or that is branded with a brand which is not on record in the office of the cattle sanitary board of New Mexico, shall be known as an "estray". . . .

New Mexico Stat. Ann. § 47-14-1 (1953). From the foregoing it is evident that state agencies established to manage and protect wildlife do not exercise authority over estrays for the simple reason that such animals are not ferae naturae. Nor is the distinction one without a difference. Authority of the state over wildlife rests on a dual basis: ownership in trust and police power. *Geer* v. *Connecticut,* supra, *New Mexico State Game Comm'n* v. *Udall,* supra; *United States* v. *Plott,* 345 F. Supp. 1229 (S.D.N.Y. 1972); *Maryland Dept. of Natural Resources* v. *Amerada Hess Corp.,* 350 F. Supp. 1060 (D.Md. 1972). By contrast, state authority over estrays stems solely from police power. *King* v. *Arlington County,* 195 Va. 1084, 81 S.E.2d 587 (1954). As stated by Mr. Justice Brandeis in *Omaechevarria* v. *Idaho,* 246 U.S. 343, 346 (1918): "The police power of the State extends over the federal public domain, at least when there is no legislation by Congress on the subject." Accordingly, the wildlife decisions relied upon by the District Court are inapposite to resolution of the instant case.

B. Provisions of the Wild Free-Roaming Horses and Burros Act Plainly Demonstrate that Horses and Burros Are Not Wildlife

Section 5 of the Act provides that "a person claiming ownership of a horse or burro on the public lands shall be entitled to recover it only if recovery is permissible under the branding and estray laws of the State in which the animal is found." 16 U.S.C. § 1335. In incorporating applicable state laws by reference it is noteworthy that Congress in section 5 refers to "branding and estray laws" rather than to "State fish and wildlife laws." Further, the provisions of section 5 of the Act relating to persons claiming ownership of horses or burros are clearly consistent with the concept of absolute property rights which an individual may possess in animals "domitae naturae" and equally inconsistent with the common law doctrine of animals "ferae naturae" which holds that wildlife is not the object of private ownership. *Geer* v. *Connecticut,* 161 U.S. at 527-29; *State ex rel. Sofeico* v. *Heffernan,* 41 N.M. 219, 67 P.2d 240 (1937).

Moreover, the legislative history of the Act leaves no doubt that Congress was well aware that "wild" horses and burros are in fact feral animals and not wildlife. Commenting on the object of the bill's protection, Representative Gude, chief sponsor of H.R. 795, one of several bills ultimately subsumed in the legislation that emerged, noted, ". . . [T]hese horses originally were escaped horses. They are not wild horses as such, they are really escaped animals." *Hearings on H.R. 795, H.R. 5375 and Related Bills Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs,* 92d Cong., 1st Sess. at 21 (1971) (hereinafter "Hearings"). Similarly, Edward P. Cliff, Chief, Forest Service, United States Department of Agriculture, articulated the point in his testimony before the House. "They [free-roaming horses] are not a species of wild animal in the true sense, but generally are domestic livestock which have become feral as a result of being abandoned or turned out on the range." *Hearings* at 63.

In an effort to emphasize this critical distinction, Representative Aspinall, Chairman of the Committee on Interior and Insular Affairs, initiated the following exchange with Boyd L. Rasmussen, Director of the

Bureau of Land Management, United States Department of the Interior, during the course of hearings:

> Mr. Aspinall. Can you tell us whether the free-roaming horses and burros qualify as wildlife and, if not, why not?
>
> Mr. Rasmussen. We do not believe they qualify as wildlife. I think the wildlife definitions say "animals that cannot be domesticated." I am sure horses can be domesticated. In the various States I do not know of any State where the game commissioner claims the animals as wildlife. They are handled by the various agencies that have to do with the domestic livestock. So we do not classify them, and I do not believe they are classified as wildlife.
>
> * * *
>
> Mr. Aspinall. Can wild horses be placed upon the endangered animal list?
>
> Mr. Rasmussen. No, they couldn't because the act that describes the endangered species requires them to be wildlife.

Hearings at 35. Section 3(a) of the Act requires that management activities be carried out "in consultation with the wildlife agency of the State wherein such lands are located," but the provision for consultation was inserted not because the subject horses and burros are wildlife but because of their competition with and impact upon wildlife. Thus, Representative Roncalio noted that:

> . . . [a] protective wild horse policy is needed, and it is needed now. Today wild horses and burros must compete with big game and domestic livestock for the limited grasses in the Western states' arid lands. This has led to serious damage to the soil, vegetation and watershed resources of the lands . . . . *Hearings* at 13.

Mr. Cliff, in his testimony, similarly underscored the interdependence of these various resources:

> Careful management of these animals [horses and burros] is essential for several reasons. The well-being of the animals themselves is important, but the watershed, range, wildlife, and other resources must be fully considered when land management decisions are made. Much of the range where horses and burros are now found is marginal and can support only very limited use. If horses and burro populations increase, other animals will have to be reduced . . . . *Hearings* at 63.

In summary, both the provisions of the Act as well as its legislative history demonstrate plainly that Congress did not look upon wild horses and burros as wildlife.

C. The Proprietary Interest of the United States Is an Adequate Basis of Authority To Protect Burros Found on the Public Domain

The instant case involves burros found on the public domain. It does not involve an assertion of federal authority with respect to burros at one time found on the public domain but found elsewhere at the operative moment. Amicus submits that congressional power to deal with the instant situation springs from the Property Clause which empowers Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U. S. Const., art. IV, sec. 3, cl. 2. The United States may gain a proprietary interest in land within a state and, in the exercise of such interest, the United States as a sovereign possesses power to protect the land as well as articles found thereon by the enactment of reasonable and appropriate ("needful") legislation. *Utah Power & Light Co.* v. *United States,* 243 U.S. 389

(1917). The proprietary control which the federal government may exercise where primary jurisdiction remains in the state is, of course, limited to powers which are reasonably related to the protection and use of its land. "As such, it is generally cognate with the control which any private landowner may exercise over the use of his own land, the chief difference being simply that the United States is constitutionally authorized to enforce its control in the Federal courts, whereas a private landowner is generally limited to the State courts." Natchez Trace Parkway, 58 I.D. 467, 472 (1943) (opinion of Gardner, Solicitor). In other words, the United States, like any landowner, may condition public access to its land. However, unlike the ordinary landowner who is limited to state courts through an appropriate action such as trespass to vindicate conditions of access, Congress by virtue of the Property Clause may establish reasonable and appropriate ("needful") conditions in law and enforce violations thereof through the federal courts. While this Court has clearly stated that the Property Clause "does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits," *Kansas* v. *Colorado,* 206 U.S. 46, 89 (1907), exercise of power under the Property Clause by the United States has been held to be permissible "so long as such power is directed solely to its own protection." *Camfield* v. *United States,* 167 U.S. 518, 526 (1897).

Amicus submits that the proprietary interest of the United States provides adequate authority for the protection of burros found on public lands. It is unnecessary to look beyond the Property Clause to the

Commerce Clause for such power for the reasons that the latter power was not invoked by Congress and, more importantly, the subject matter is plainly of a local nature.

CONCLUSION

For the reasons set forth above, the judgment of the District Court should be reversed.

Respectfully submitted,

INTERNATIONAL ASSOCIATION
OF GAME, FISH AND CONSERVATION COMMISSIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1488

ROGERS C. B. MORTON, Secretary of Interior,
Appellant,

v.

STATE OF NEW MEXICO, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of New Mexico

BRIEF OF AMICUS CURIAE WILD HORSE ORGANIZED ASSISTANCE, INC.

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INDEX

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
CONCLUSION	11

CITATIONS

CASES:

Federal Power Commission v. Idaho Power Company, 344 U.S. 17, *reh. denied,* 344 U.S. 910 (1952) 7
State of Alabama v. State of Texas, 347 U.S. 272, *reh. denied,* 348 U.S. 950 (1954) 7
United States v. City and County of San Francisco, 310 U.S. 16 (1940), *reh. denied,* 310 U.S. 857 8
United States v. Grayline Water Tours of Charleston, 311 F.2d 779 (4th Cir., 1952) 8
United States v. State of California, 332 U.S. 737 (1947) 7
Utah Power & Light Company v. United States, 243 U.S. 389 (1917) 8

CONSTITUTION AND STATUTES:

U.S. Const., Art. IV, Section 3 4
Pub. L. No. 86-234, 86th Cong., 1st Sess. (1959) 1, 10
Pub. L. No. 92-195, 92d Cong., 1st Sess. (1971) 1, 4

MISCELLANEOUS:

S. Rep. No. 92-242, 92d Cong., 1st Sess. (1971) 4, 5, 6
Conference Report 92-681, 92d Cong., 1st Sess. (1971) 4, 7
S. Rep. No. 86-802, 86th Cong., 1st Sess. (1959) 10

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BRIEF OF AMICUS CURIAE WILD HORSE ORGANIZED ASSISTANCE, INC.

INTEREST OF AMICUS CURIAE

Wild Horse Organized Assistance, Inc. ("WHOA!") is a nonprofit corporation organized for the purpose of sponsoring the protection of wild horses in the Western United States.[1] WHOA! has, since its incep-

[1] This brief is filed with the consent of both parties pursuant to Rule 42 of the Supreme Court Rules.

tion, had a primary purpose of urging control and prevention of the slaughter of wild free-roaming horses and burros.

Indeed, WHOA! has, through Mrs. Velma B. Johnston (Wild Horse Annie), Chairman of its Board of Trustees, testified before Congress in conjunction with both Pub. L. No. 86-234, 86th Cong., 1st Sess. (1959) (commonly known as the Wild Horse Annie Act), which forbade the hunting of wild horses and burros on public land by use of aircraft or motor vehicles, and Pub. L. No. 92-195, 92nd Cong., 1st Sess. (1971), the Wild and Free-Roaming Horses and Burros Act, which is the subject of this case. In each instance, WHOA! testimony has demonstrated the necessity for federal legislation protective of wild and free-roaming horses and burros and has highlighted the relationship of such wild and free-roaming horses and burros to the historical and natural value of western lands, especially public lands in the west.

Since WHOA!'s very purpose is the protection and preservation of wild and free-roaming horses and burros as a valuable part of American heritage and the present public land system, and since WHOA! submits that the Wild Free Roaming Horses and Burros Act is the only adequate protection currently afforded wild and free-roaming horses and burros, WHOA! is greatly interested in the Court's decision concerning the constitutionality of that Act.

SUMMARY OF ARGUMENT

The history of wild horses and burros in the Western United States, a story of man's destruction of nature, is saved from a complete tragedy only by the almost too late recognition by Congress of a responsibility to

all the citizens of the United States to preserve these natural inhabitants of the prairies from total destruction. Before the creation of the states and federal government, these wild creatures wandered over the vast grasslands of the west, subject only to natural laws of survival. The horses and burros were part of the natural balance in which animal, water and land merged into a unified system of life.

The survival of wild and free-roaming horses and burros as components of this system of life on the prairies has been seriously threatened by their value to man, and prior to intervention of the federal government by virtue of the Wild Free Roaming Horses and Burros Act, it appeared that horses and burros would be exterminated by man. Thus, these elements of the natural system of life on the western lands were about to be completely destroyed.

Congress, however, has now acted to preserve wild and free-roaming horses and burros as integral parts of the lands owned by all the citizens of the United States, the public lands. In so acting, Congress has validly exercised its powers under the Constitution in order to preserve integral components of the public lands system.

ARGUMENT

All parties to this case agree that the sole question involved in this case is whether the Wild Free Roaming Horses and Burros Act is within the scope of powers conferred upon Congress by the Property and Commerce Clauses of the United States Constitution.

Because WHOA! contends that the Property Clause provides an entirely appropriate basis for upholding

the congressional action under scrutiny, without the necessity for inquiry into the Act's validity under the broad congressional powers over interstate commerce, WHOA!'s argument will be confined to a discussion of the Act's validity under the Property Clause. Thus, this brief will argue that the Act is within the power of Congress "to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States . . ." U.S. Constitution, Article IV, Section 3, Clause 2.

WHOA! submits that Congress may, without question, promulgate measures necessary for the regulation of the system of public lands and the multiple-use of such lands. Since Congress had validity determined that wild and free-roaming horses and burros are integral parts of the public lands and, in fact, constitute components of such lands necessary for and valuable to the preservation of the natural system of the public lands, the Act must be viewed as a "needful regulation" of public land valid under the Property Clause.

It is apparent that there are two fundamental propositions underlying the Act. First, the legislative history, and plain language, of the Act demonstrate that Congress was seeking, in connection with wild and free-roaming horses and burros, the implementation of a multiple-use concept of public land management. Thus, Congress expressly rejected the setting aside of specific ranges upon which wild horses and burros could run free from encroachment by mankind. Conference Rep. No. 92-681, 92d Cong., 1st Sess. (1971); S. Rep. No. 92-242, 92d Cong., 1st Sess. (1971).

Instead, it was Congress' intention that wild and free-roaming horses be part of a multiple-use of public

lands and that, therefore, wild and free-roaming horses should be permitted to roam without restriction to particular ranges. In this fashion, the entire expanse of public lands continues to be open for a multitude of uses and the natural setting of the lands is preserved.

This concept of multiple-use of public lands is demonstrated in Senate Report No. 92-242 in which it is provided that:

> "During the course of the April 20 hearing, witnesses repeatedly urged that the wild free-roaming horses and burros be considered a part of the multiple-use system of the public lands and not be placed in set aside areas for their exclusive use . . . It is the intent of the Committee that the wild free-roaming horses and burros be specifically incorporated as a *component of multiple-use management plans* governing the use of the public lands." (emphasis added) S. Rep. No. 92-242, 92d Cong., 1st Sess. (1971)

Consequently, it is apparent that the existence of wild and free-roaming horses and burros has been found by Congress to be one of the valuable elements in the multiple-use of public lands.

As a second basis of the Act, and a means of accomplishing this multiple-use plan for public lands through the preservation of wild and free-roaming horses and burros, Congress sought to integrate the treatment of wild horses into the entire management of the natural system of public lands. Thus, these animals, which for decades have roamed free over the prairie in the Western United States, have been identified by Congress as a basic component of land usage itself. This concept of the dynamic interaction of wild and free-roaming

horses and burros with the public lands is demonstrated in the purpose clause of the Act which provides, in part, that the wild and free-roaming horses and burros:

> "are to be considered *in the area where presently found,* as *an integral part* of the natural system of the public lands." Pub. L. No. 92-195, 92d Cong. 1st Sess. (1971) (emphasis added)

Thus, Congress studied wild and free-roaming horses and burros and found their existence on the public lands in the Western United States to constitute a basic component of that system of lands. Indeed, Congress has concluded that wild and free-roaming horses are creatures basic to the public lands in the Western United States.

Wild and free-roaming horses and burros roam on public lands and are part of the public land heritage of all citizens of the United States. Consequently, Congress found those areas, that is, the public lands, were enhanced by the existence of wild and free-roaming horses and Congress established a statutory scheme in which wild and free-roaming horses could not be indiscriminately destroyed. Such free destruction would disrupt the natural system under which public lands have been preserved for the American people. Thus, in Senate Report 92-242, the Interior and Insular Affairs Committee stated:

> "During the course of the hearing, knowledgeable witnesses urged that emphasis be shifted from a range or refuge concept for protection and management of the animals to consideration of the wild free-roaming horses and burros as a component of the public lands in an integral part of the multiple-use management system. The Committee believes that such action would be in the best interest of multiple-use resource management and would best serve the overall intent of the legislation."

Further, in the Conference Report No. 92-681, which accompanied the final measure, the Conference Committee stated that:

> "Reliance on ranges, and particularly, fenced ranges, would defeat the purpose of the legislation, that is, the survival of wild free-roaming horses and burros, and substitute a zoo like concept. The conferees are of the opinion that the confinement of these animals to such ranges, except in unusual circumstances, should be discouraged and that the animal should be considered as integral parts of the public lands, which should be administered on concepts of multiple use."

Within this context, there can be no question that wild and free-roaming horses and burros were determined by Congress to be components of the public lands.

The authority of the Congress in the management and control of public lands and components of public lands is supreme. Congress not only has legislative power over the public domain, but also exercises the powers of the proprietor therein and it may deal with such lands precisely as an ordinary individual might deal with his own property. *State of Alabama* v. *State of Texas,* 347 U.S. 272 (1954), *reh. denied,* 348 U.S. 950.

Thus, Congress has power over public lands and that power is enhanced by the Supremacy Clause of the Constitution in a manner such that Congress may act in this area without limitations and its actions take precedent over actions of states in an identical area of interest. *Federal Power Commission* v. *Idaho Power Company,* 344 U.S. 17 *reh. denied,* 344 U.S. 910 (1952); *United States* v. *State of California,* 332 U.S. 19

(1947); *Utah Power & Light Company* v. *United States*, 243 U.S. 389 (1917); *United States* v. *Grayline Water Tours of Charleston*, 311 F.2d 779 (4th Cir., 1962). In effect, Congress is a trustee of public lands for all of the people and must preserve the public lands, as well as the components thereof, for the good of the people. *United States* v. *City and County of San Francisco*, 310 U.S. 16 (1940), *reh. denied*, 310 U.S. 857. The Property Clause having been often interpreted as a mandate for Congressional action regarding public lands consistent with the trust to preserve such public lands for the citizens of the United States, there can be no doubt that regulation and control of such integral components of the public lands as the wild and free animals roaming thereon is indeed within the scope of the Property Clause.

Illustrative of the reason for congressional recognition of wild and free-roaming horses and burros as components of the public land and its responsibility for the preservation of wild horses and burros as such components of the public lands is the history of slaughter of wild horses and burros on these lands that are owned by all the citizens of the United States. Indeed, it is instructive of the background of the Wild Free-Roaming Horses and Burros Act to discuss the history that is responsible for congressional recognition of the horses and burros integral connection with public lands which supports the enactment of measures protective of wild horses and burros.

Numbering around 2,000,000 at the turn of the century, wild and free-roaming horses had actually been reduced to an entire population of 25,000 throughout the entire west by the 1950's. The actual turning point in their history came with the rise of the canned pet

food business, and the demand for fresh horse meat sold in pet food shops. Once the big slaughter got underway, the wild horse was doomed, for now his extermination served two purposes: A vast amount of range clearance was accomplished, and his carcass provided cheap meat for the processors with a tidy profit for the captors, the professional hunters. Although not so highly commercially exploited, wild burros fared no better in extermination programs.

The old technique of rounding up horses with crews of mounted riders was too slow, cutting down the profits, so the cowboys took to the air. Mustangs were driven at breakneck speed by low flying planes from their hiding places in the rough and barren rimrock areas onto flatlands or dry lake beds, where the chase was taken up by hunters on fast moving trucks which pursued the animals until they were close to collapse from exhaustion. Securely tied, they were dragged up rough ramps into waiting transport trucks for the long haul to slaughtering houses. Sometimes they were driven into box canyons from which there was no escape, or into manmade trap corrals where their violent contact with wood and wire caused serious and painful injuries.

Physical condition of the wild horses was of no concern, as the only requirements at processing centers were that the animals be ambulatory and in quantity, for which the mustangers were paid by the pound on the hoof. Since returns depended upon quantity, handling of the animals was ruthless, cruel and indiscriminate. Animals were maimed and mutilated, but not killed which would have been more merciful but were punished through such mechanisms as shotgun

blasts in order to keep them on the run. This history was placed before Congress by Mrs. Velma B. Johnston (Wild Horse Annie) on behalf of WHOA! prior to passage of Public Law No. 86-234, 86th Cong., 1st Sess. (1959) and such history was incorporated in the Senate Report on the measure. S. Rep. No. 81-802, 86th Cong., 1st Sess. (1959).

On September 8, 1959, the federal government took the initial step to halt this campaign leading towards extermination when President Eisenhower signed Public Law 86-234 which prohibits the use of aircraft or motorized vehicles to hunt certain wild horses and burros on land belonging to the United States. This measure, however, did not prove strong enough.

Responsibility for enforcement of Public Law 86-234 (Wild Horse Annie Act) rested with local and state officials. Wild horses and burros exist in states whose wide expanses of open range provide grazing for domestic livestock and habitat for target animals. Being neither an edible nor a trophy animal, the wild and free-roaming horses and burros are considered intruders by some. Lack of action by local authorities allowed the continued use of aircraft and vehicles in the harvesting of horses and burros.

Since efforts toward enactment of stronger management, protection and control measures have had historically little or no success on the state level, it became apparent that only federal action could prevent continued commercial exploitation of wild horses and burros which roam on the public lands in the west.

When the fate of the animals rested with the separate states, "harvests" by commercial mustangers and other rancher sponsored operations were much more

widespread than Congress had believed in 1959. Although use of aircraft and motorized vehicles had been outlawed in 1959, illegal use of aircraft continued and water-trapping proved to be a successful method of capture. Therefore, Congress concluded that the "harvests," possible and profitable under state laws, were responsible for the declining population. Had they continued, there would have been no wild horses in a relatively short time and this element of the natural system of public lands would have vanished. Obviously, the need for legislation to remove them from the jurisdiction of the several states and thereby, save them for the public lands was great. The Act under review here was the answer to that need.

In a breakdown of the combined wild horses and domestic livestock use in our ten western states, wild and free-roaming horse use is 2.9% while domestic livestock use is 97.1%. Congress sought in the Act only to preserve this small portion of the total horse population as a valuable component of the public lands. Without this element, the public lands would be less valuable for all citizens.

CONCLUSION

WHOA! submits that Congress has validly determined wild and free-roaming horses and burros to be integral components of the public lands and has found that the survival of such animals is necessary for the protection and preservation of the natural system of public lands. Congress has the power under the Property Clause to protect and preserve the public lands through statutes preserving components integrally related to public lands. Therefore, the Wild Free-

Roaming Horses and Burros Act is founded upon a sound constitutional basis and is valid.

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BRIEF OF AMICI CURIAE ON THE MERITS

**CENTRAL COMMITTEE
OF NEVADA STATE GRAZING BOARDS AND
DUCKWATER SHOSHONE TRIBE**

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INDEX

Preface 1
Opinion Below 2
Jurisdiction 2
Constitutional Provisions and Statutes Involved 2
Consent 3
Interest of Amici Curiae 3
Statement of the Case 5
Question Presented 6
Introduction and Summary 6
Argument 8
Commerce Clause 14
Conclusion 15
Appendix A—Pertinent Parts of N.R.S. Chapters 569 and 571 17
Appendix B—Qualifications for Membership to State Grazing Boards 18

Citations

Cases

Alabama v. *Texas*, 347 U.S. 272 (1954) 8
Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 (1936) 8
Burgess v. *M/V Tamano*, 370 F.Supp. 247 (D.C. Maine 1973) 10
Carpenter v. *Morton*, Civil R-75-1-BRT (before D.C. Nevada) 4
Chalk v. *United States*, 114 F.2d 207 (4th Cir. N.C. 1940), *cert. denied*, 312 U.S. 679 (1941) 12
Federal Power Commission v. *Idaho Power*, 344 U.S. 17 (1952) 8

Foster-Fountain Packing Co. v. *Haydel*, 278 U.S. 1 (1928) 10
Geer v. *Connecticut*, 161 U.S. 519 (1896) 9
Hunt v. *Arizona*, 278 U.S. 96 (1928) 10
Ivanhoe Irrigation District v. *McCraken*, 357 U.S. 275 (1958) 8
La Coste v. *Department of Conservation*, 263 U.S. 545 (1924) 9
McCready v. *Virginia*, 94 U.S. 391 (1865) 9
Maine v. *M/V Tamano*, 357 F.Supp. 1097 (D.C. Maine 1973) 10
Maryland v. *Amerada Hess Corp.*, 350 F.Supp. 1060 (D.C. Md. 1972) 10
Milk Wagon Driver's Union of Chicago v. *Meadowmoor Dairies*, 312 U.S. 287 (1941) 14
New Mexico State Game Commission v. *Udall*, 410 F.2d 1197 (10th Cir. 1969) 11
Newhall v. *Sanger*, 92 U.S. 761 (1875) 11
Oklahoma v. *Texas*, 258 U.S. 574 (1922) 12
Rainier Nat. Park Co. v. *Martin*, 23 F.Supp. 60 (D.C. Wash. 1938), *aff'd*, 302 U.S. 661 (1938) 12
Silz v. *Hefterberg*, 211 U.S. 31 (1908) 10
Toomer v. *Witsell*, 334 U.S. 385 (1948) 9
United States v. *California*, 332 U.S. 19 (1947) 8
United States v. *Kipp*, 369 F.Supp. 774 (D.C. Mont. 1974) 11
United States v. *Plott*, 345 F.Supp. 1229 (D.C. N.Y. 1970) 11, 15
United States v. *San Francisco*, 310 U.S. 16 (1940) 8
Ward v. *Race Horse*, 163 U.S. 504 (1896) 10
Yellowstone Park Transp. Co. v. *Gallatin County*, 31 F.2d 644 (9th Cir. 1929), *cert. denied*, 280 U.S. 555 (1929) 12

CONSTITUTION AND STATUTES

U.S. Const. Art. I, Section 8 ..... 13, 14
U.S. Const. Art. IV, Section 2 10
U.S. Const. Art. IV, Section 3 ..... 2, 8, 11
U.S. Const. Amend. X 2, 7, 9
Endangered Species Act of 1973, 16 U.S.C. (Supp. III) 1531 et seq. 13
16 U.S.C. 1533(d) 13
Federal Advisory Committee Act, 86 Stat. 770, 5 U.S.C. Appendix I 4
Fur Seal Act of 1966, 16 U.S.C. 1151 et seq. 13
16 U.S.C. 1151 13
Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. (Supp. III) 1361 et seq. 13
16 U.S.C. 1361(5) 13
National Wildlife Refuge System Act, as amended, 16 U.S.C. 668dd-668ee 12
16 U.S.C. 668dd(c) 12
Nevada's Enabling Act, 13 Stat. 30-32 (1864) 3, 16
Taylor Grazing Act, 43 U.S.C. 315 et seq., 315o-1 4
Wild and Scenic Rivers Act, 16 U.S.C. 1271 et seq. 13
16 U.S.C. 1284(a) 13
Wild Free-Roaming Horses and Burros Act, 16 U.S.C. (Supp. III) 1331-1340 ..... 3, 8
16 U.S.C. 1332(b) 8
Wyoming's Enabling Act, 26 Stat. 222 (1890) 12
16 U.S.C. 26 12
16 U.S.C. 98-99 12
16 U.S.C. 117 12
16 U.S.C. 671-697a 12
28 U.S.C. 1252-1253 2
1891 Mont. Laws 262 12

NEVADA REVISED STATUTES

N.R.S. 235.070 7
N.R.S. 568.060 4
N.R.S. 568.170 3
N.R.S. Chapter 569 17
N.R.S. Chapter 571 17
1915 North Carolina Laws 205 12
North Carolina Code Ann. (1939) Sec. 2099 12

GENERAL SERVICES ADMINISTRATION MATERIALS

Effects of Livestock Grazing on Wildlife, Watershed, Recreation and Other Resource Values in Nevada, U.S. Department of Interior, Bureau of Land Management, February, 1975, pp. 35-36 5
Inventory Report on Real Property Owned by the United States Throughout the World, as of June 30, 1967, Table 4, p. 46 5

MISCELLANEOUS

Webster's Third New International Dictionary 1836 (1966) 11

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CENTRAL COMMITTEE OF NEVADA STATE GRAZING BOARDS AND DUCKWATER SHOSHONE TRIBE

PREFACE

This joint Brief filed by the Central Committee of Nevada State Grazing Boards and the Duckwater Shoshone Tribe closely follows the brief filed previously by the Central Committee of Nevada State Grazing Boards and the Nevada Board of Agriculture in answering the Appellant's Jurisdictional Statement. This Brief in addition will set forth the interests of the Duckwater Shoshone Tribe and answer arguments advanced by Amici supporting the Appellant.

OPINION BELOW

The opinion of the District Court is not yet reported and appears as Appendix A in the Appellant's Jurisdictional Statement.

JURISDICTION

The jurisdiction of this Court was invoked by the Appellant under 28 U.S.C. 1252 and 1253 and is not questioned by the Amici.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article IV, Section 3 of the United States Constitution (the "Property Clause") provides in part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any Claims of the United States, or of any particular State.

2. Amendment X, of the United States Constitution (the reserved "Police Powers") provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

3. The Wild Free-Roaming Horses and Burros Act, 85 Stat. 649-651, 16 U.S.C. (Supp. III) 1331-1340, enacted December 15, 1971, is reproduced in Appendix F of the Appellant's Jurisdictional Statement.

4. Act of Congress (1864) Enabling the People of Nevada to Form a Constitution and State Government, 13 Stat. 30-32 (1864) provides in part:

> That the inhabitants of that portion of the territory of Nevada included in the boundaries hereinafter designated be, and they are hereby, authorized to form for themselves, out of said territory, a state government, with the name aforesaid, which said state, when formed, shall be admitted into the Union upon an equal footing with the original states, in all respects whatsoever.

CONSENT

Both the Central Committee of Nevada State Grazing Boards and the Duckwater Shoshone Tribe appear with the consent of the Appellant and Appellees pursuant to Rule 42 (1) of the Supreme Court Rules.

INTEREST OF AMICI CURIAE

The Central Committee of Nevada State Grazing Boards (Central Committee) is a representative body of members of the several District Grazing Boards. Such Committee membership is comprised of knowledgeable, actual users of the western range, N.R.S. 568.170, as

amended in 1975, who in turn were chosen from District Grazing Boards, N.R.S. 568.060, as amended in 1975.[1] The purpose of the Central Committee is to manage and improve the ranges within the State of Nevada, N.R.S. Chapter 568.

The Duckwater Shoshone Tribe (Shoshone Tribe) is a tribe of approximately 125 Indian people living on the small Duckwater Indian Reservation in Northeastern Nye County, Nevada. Their only source of income is raising livestock—livestock that necessarily must spend part of the year grazing on the "public domain" managed by the Bureau of Land Management (BLM). The rapidly exploding "wild and free roaming horse" population is detrimentally affecting many facets of their way of life—depletion of range lands, diminution of deer herds, and now, a real threat by the BLM to make drastic cuts in the number of livestock they are allowed to run on the "public domain" in order to provide "wild horse" forage. After years of adapting to "white man's" agrarian ways, these Indian people once again seem to have misplaced their reliance on "white man" and their Trustee—the Department of the Interior.

The Central Committee and the Shoshone Tribe both have a deep interest in having the Appellees' position affirmed. At stake is the local control and sovereignty

1. The membership qualification procedure prior to the 1975 amendment and the amended statute, N.R.S. 568.060 are set forth in Appendix B. The 1975 amendment provides generality and independence from possible change in the practice and regulations of the Bureau of Land Management. The issue as to continued existence of Grazing District Advisory Boards under the Taylor Grazing Act, 43 U.S.C. Sec. 315o-1 since the passage of the Federal Advisory Committee Act, Pub. L. 92-463, 86 Stat. 770, 5 U.S.C. Appendix I, is presently before the United States District Court, District of Nevada, in *Carpenter* v. *Morton*, Civil R-75-1-BRT.

of Nevada in dealing with local problems affecting agriculture and livestock production—a large segment of Nevada's economy, and virtually the only economy of many western states' Indian reservations such as is inhabited by the Shoshone Tribe. Any position less than total affirmation of the Court below would cast serious aspersions on the Central Committee's authority to continue serving Nevada by carrying out its statutory duty on the vast majority of lands within the State and would deal a damaging blow to the economy of the State. Nevada, being composed of eighty-six (86%) per cent federally owned land[2] is second only to Alaska in such percentage of federal ownership and is the leader in "wild and free-roaming horses and burros" with approximately 25,000.[3] Should the Appellant prevail, Nevada's control of estrays would be emasculated, as would its ability to control diseased animals or perform range improvements of the federally owned 86% of Nevada. The United States will have lost a valuable service and Nevada will have at least lost agricultural self-rule. Additionally, the Shoshone Tribe, as with other livestock producers, should their livestock grazing permits be cut back to provide "wild horse" forage, will have lost a way of life.

STATEMENT OF THE CASE

The Amici Curiae adopt the Statement of the Case made by the Appellees.

2. Inventory Report on Real Property Owned by the United States throughout the World, as of June 30, 1967, General Services Administration, Washington, D. C. Table 4, p. 46.

3. Effects of Livestock Grazing on Wildlife, Watershed, Recreation and Other Resource Values in Nevada, U.S. Department of Interior, Bureau of Land Management, February, 1975, at pp. 35-36.

QUESTION PRESENTED

Whether a Three-Judge Federal District Court correctly held the Wild Free-Roaming Horses and Burros Act unconstitutional as exceeding the power of Congress to protect federal lands, and as infringing on the "Police Powers" reserved to the States.

INTRODUCTION AND SUMMARY

The term "Wild Horses" conjures up visions of that gallant steed escaping from the Spanish Conquistadors to roam the prairie. The problem with allowing such romanticism to prevail is that the term has been expanded to cover horses recently wandering from local ranches, or horses recently released to fend for themselves during hard winter months. What truly are "wild horses" today, if there is such a thing, nobody seems to know.[4] Information is sketchy as inventories are usually made by aircraft where branding or other indicia of prior private use cannot be ascertained.

Several facts are certain: 1) Most horses and burros on the western range can be traced to either direct private ownership or recent private control of the animals or their forebears; 2) In certain areas, the horses have proliferated so as to cause serious damage to range lands be they federal, state or private; 3) Range horses within

4. Hearings on H. R. 795, H. R. 5375 and Related Bills Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs, 92 Cong. 1st Sess. (1971). See Brief of Amicus Curiae International Association of Game and Fish Conservation Commissioners, page 9.

a comparatively short period of time of last domestic control adapt to the wild and become difficult if not impossible to capture or even approach; 4) Indigenous wildlife suffers or even disappears from its native range when horses proliferate and compete for food supplies.

These matters are of concern to the Amici who believe that the law is clear that the States have the rights and obligations to control wildlife within their borders as developed in the Common Law and under exercise of their "Police Powers", U.S. Const. Amend. X. It is necessary to proper and orderly management of livestock and agriculture, major contributors to Nevada's economy, as well as wildlife, that local matters be left to local control.

It is ironic that Congress has sought federal protection of "wild horses" when it is the local livestock interests that have introduced them onto the local ranges. Should they ever become endangered, the herds could quickly be replenished from the source from whence they came—the barnyard, a feat not possible for a truly endangered specie such as the Desert Bighorn[5] whose numbers are dwindling due in part to the domination of their original range by "wild free-roaming horses and burros".

It may seem strange, but as the life style of the western range land is being threatened by over-protection of non-indigenous animals, the Cowboys (Central Committee) and Indians (Shoshone Tribe) are banding together to ask this Honorable Court to apply a rule of reason and law that preserves their heritage, independence, the heritage of the West, the sovereignty of the State of Nevada, and the doctrine of *stare decisis*.

5. Nevada's state animal, N.R.S. 235.070.

ARGUMENT

The Wild Free-Roaming Horses and Burros Act Is Unconstitutional, Exceeding the Power of Congress to Protect Federal Lands and Infringing on the Police Powers Reserved to the States.

It is clear from the face of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. (Supp. III) 1331-1340, that it does not deal with the protection of federal lands. Simply stated, the Act protects "unbranded and unclaimed horses and burros", 16 U.S.C. 1332(b). Such definition includes unbranded private horses wandering into federal lands that cannot be located to be claimed.

The Amici do not doubt, nor do they argue against, the power of Congress to deal with the classical concepts of real property as associated with federal lands under the "Property Clause", U.S. Const. Art. IV, Section 3. The cases are consistent: *United States* v. *San Francisco*, 310 U.S. 16 (1940), conditions on disposal of public lands; *United States* v. *California*, 332 U.S. 19 (1947), offshore property rights; *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17 (1952), conditions on use of public lands; *Alabama* v. *Texas*, 347 U.S. 272 (1954), disposal of public lands; *Ivanhoe Irrigation District* v. *McCraken*, 357 U.S. 275 (1958), use of public lands and federal property.

The Appellant cites *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1936) for the proposition that Congress's powers under the "Property Clause" extends to "what the land contain(s)". Again, the Amici cannot disagree with the authority cited, only with the appropriateness of its application to the issue—"wild free-roaming horses and burros" (ferae naturae). *Ashwander* dealt specifically with water and water rights on condemned

land, a concept long associated as being a real property right. The passage quoted by the Appellants is from a discussion of mineral rights reserved by the United States, rights truly contained in the land and again classically dealt with as real property. It is difficult to visualize "wild free-roaming horses and burros", or other wildlife as being "contained in the land". Such is inconsistent with notions of what is wild and free-roaming.

This Court has long held that the several states are charged with the responsibility and exclusive control of non-migratory wildlife within their external boundaries by Common Law rights and under exercise of their "Police Powers", U.S. Const. Amend. X, *La Coste* v. *Department of Conservation*, 263 U.S. 545, 549 (1924):

> The wild animals within its borders are, so far as capable of ownership *owned by the state in its sovereign capacity*, for the common benefit of all people. Because of such ownership, *and in the exercise of its police power, the state may regulate and control the taking, subsequent use and property rights that may be acquired therein.* (Emphasis added). (Citations omitted).

The rationale set forth in *La Coste* stems from a long pattern of cases recognizing state control of wildlife, *Geer* v. *Connecticut*, 161 U.S. 519 (1896) and *McCready* v. *Virginia*, 94 U.S. 391 (1865).

A more recent decision by this Court, *Toomer* v. *Witsell*, 334 U.S. 385 (1948), reiterated your long-standing position. *Toomer* dealt with the discriminatory taxation and licensing ($25 v $2500) of non-resident shrimp fishermen off the coast of South Carolina. While holding that such a wide divergence of taxation and license fees was a violation of the "Privileges and Immunities Clause",

U.S. Const. Art. IV, Section 2, Justice Frankfurter sets forth in his concurring opinion the body of law that had developed, *supra* at 408, 409:

> . . . A state may care for its own [resources] in utilizing the bounties of nature within her borders, because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers.
>
> When the Constitution was adopted, such, no doubt, was the common understanding regarding the power of States over its fisheries, and it is this common understanding that was reflected in McCready v. Virginia, 94 U.S. 391, 24 L.Ed. 248. *The McCready case is not an isolated decision to be looked at askance. It is the symbol of one of the weightiest doctrines in our law.* It expressed the momentum of legal history that preceded it, and around it in turn has clustered a voluminous body of rulings. Not only has a host of State cases applied the McCready doctrine as to the power of the States to control their game and fisheries for the benefit of their own citizens. . . (Emphasis added).

The above position has never been repudiated with both state and federal decisions so holding being too numerous to chronicle herein. However, other pertinent decisions of this Court and applicable recent decisions of the lower federal courts are: *Hunt* v. *Arizona,* 278 U.S. 96 (1928); *Foster-Fountain Packing Co.* v. *Haydel,* 278 U.S. 1 (1928); *Silz* v. *Hefterberg,* 211 U.S. 31 (1908); *Ward* v. *Race Horse,* 163 U.S. 504 (1896); *Burgess* v. *M/V Tamano,* 370 F.Supp. 247 (D.C. Maine 1973); *Maine* v. *M/V Tamano,* 357 F.Supp. 1097 (D.C. Maine 1973); *Maryland* v. *Amerada Hess Corp.,* 350 F.Supp. 1060 (D.C. Md. 1972);

United States v. *Plott,* 345 F.Supp. 1229 (D.C. N.Y. 1970); and *New Mexico State Game Commission* v. *Udall,* 410 F.2d 1197 (10th Cir. 1969).

The Appellants attempted to bolster their plea by raising the spector of all the wildlife protection legislation that must fall if the judgment is affirmed. This "parade of the horribles" just cannot be supported in the law, the constitutional infirmities present in the Wild Free-Roaming Horses and Burros Act being absent in the other legislation.

The Wild Free-Roaming Horses and Burros Act speaks of "public lands of the United States" in the definition of "wild free-roaming horses and burros" and "public lands of the United States" has come to mean ". . . those lands subject to sale or disposal under general laws (Newhall v. Sanger, 92 U.S. 761, 23 L.Ed. 769 (1875)). . .", *United States* v. *Kipp,* 369 F.Supp. 774, 775 (D.C. Mont. 1974).

The vast public domain has been reduced from general use, entry and acquisition by withdrawals of reservations, parks, monuments, refuges and other special uses for Indians, military needs, recreation, and conservation. The law is replete with authority for Congress to act under the "Property Clause", U.S. Const. Article IV, Section 3, in making such withdrawals and reservations. Such land so withdrawn or reserved is no longer "public land of the United States", instead it becomes a different class of federally owned land. This distinction is so well engrained in our understanding that District Judge Russell Smith saw fit to set forth a general dictionary definition so noting the distinction.[6] Judge Smith finished his dis-

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6. Webster's Third New International Dictionary 1836 (1966) defines "public land" as "land owned by a government, esp. a national government; *specif*: that part of the U. S. public domain subject to sale or disposition under the homestead laws."

cussion on this point by stating, *supra* at 775, 776: ". . . and were the problem merely one of statutory construction it is quite clear that lands in Glacier Park would be held not to be public lands of the United States." See also: *Oklahoma* v. *Texas*, 258 U.S. 574 (1922).

With such a withdrawal or reservation of refuge and park lands from the "public lands" the Appellant should not fear for those refuges and wildlife in parks as is provided for in 16 U.S.C. 671-697a, and 16 U.S.C. 26, 98-99. A special level of federal control has attached because of the special use to which the lands are put.

In many instances, the park or refuge is doubly protected because of a ceding of state jurisdiction to the federal government: Yellowstone National Park, Act Admitting State of Wyoming into the Union, July 10, 1890, 26 Stat. 222, 1891 Mont. Laws 262, February 14, 1891, *Yellowstone Park Transp. Co.* v. *Gallatin County*, 31 F.2d 644 (9th Cir. Mont. 1929), *cert. denied*, 280 U.S. 555 (1929); Mount Rainier National Park, 1901 Washington Session Laws 192, *Rainier Nat. Park Co.* v. *Martin*, 23 F.Supp. 60 (D.C. Wash. 1938), *aff'd*, 302 U.S. 661 (1938); Mesa Verde National Park, Act of the Legislature of Colorado, approved May 2, 1927, see 16 U.S.C. 117; Pisgah National Game Preserve, 1915 North Carolina Laws 205, N.C. Code Ann. (1939), Sec. 2099 (4th Cir. N.C.); *Chalk* v. *United States*, 114 F.2d 207, *cert. denied*, 312 U.S. 679 (1941).

The other federal acts cited by the Appellant as dangerously in conflict with the lower court's opinion are self-cleansing—they contain either specific language ruling against such confrontation with State fish and game laws, or they are easily distinguished.

The National Wildlife Refuge System Act of 1966, as amended, 16 U.S.C. 668dd-668ee, specifically states, Section 668dd(c):

> The provisions of this Act shall not be construed as affecting the authority, jurisdiction or responsibility of the several States to manage, control or regulate fish and resident wildlife under State law or regulations in any area within the System.

The Wild and Scenic Rivers Act, 16 U.S.C. 1271 et seq. specifically states, Section 1284(a):

> Nothing in this chapter shall affect the jurisdiction or responsibilities of the States with respect to fish and wildlife.

The Endangered Species Act of 1973, 16 U.S.C. (Supp. III) 1531 et seq. specifically states, Section 1533(d):

> The Secretary may by regulation prohibit with respect to any threatened species . . . except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to Section 1535(a) of this title *only to the extent that such regulations have also been adopted by such State.* (Emphasis added).

Both the Fur Seal Act of 1966, 16 U.S.C. 1151 et seq. and the Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. (Supp. III) 1361 et seq. will find continued and prosperous life regardless of the outcome of this appeal: they find their basis in the Commerce powers of the Congress, U.S. Const. Art. I, Section 8. See 16 U.S.C. 1151 where authority over fur seals is vested in the Secretary of Commerce, and 16 U.S.C. 1361(5) where Congress expressly found in the statute itself, that marine mammals or their products move in interstate commerce.

More deserving of consideration would be the implied reversal of all states' fish and game laws, estray laws

and diseased animal laws at least as to "public lands", not to mention a long-standing body of law, should the lower court's opinion be overturned. "To maintain the balance of our federal system, insofar as it is committed to our care, demands at once zealous regard for the guarantees of the Bill of Rights and due recognition of the powers belonging to the states," *Milk Wagon Drivers Union of Chicago* v. *Meadowmoor Dairies*, 312 U.S. 287, 297 (1941). Statehood of our "public land states" is at issue as we approach our bicentennial year.

COMMERCE CLAUSE

Several of the briefs favoring the Appellant's position make passing reference to the Commerce Clause, U.S. Const. Art. I, Section 8, opining that it has application in the instant case. The District Court in their Memorandum Opinion found otherwise:

> ". . . No evidence was presented to support this theory; in fact, all the evidence establishes that the wild burros in question here do not migrate across state lines. Further, the Congress made no finding to indicate that it was in any way relying on the Commerce Clause in enacting this statute."

See: Appellant's Jurisdictional Statement, Appendix A, Page 5a.

Nevertheless, Amicus Curiae Hope Ryden attempts to establish "Commerce Clause" facts by citing "wild horse" herds that straddle state boundaries. Her argument is self-defeating.

Amicus Ryden points to "wild horse" herds in the Pryor Mountains along the Montana-Wyoming border,

along the Nevada-California border, in the Bookcliff Mountains along the Colorado-Utah border, and on Assategue Island along the Maryland-Virginia border. *Every case she cites involves an arbitrarily placed state boundary—none following natural, geographical boundaries such as major rivers, or major mountain divides.* She admits that the "wild horses" remain in geographical islands—particularly mountain ranges or on actual islands.

Wild horses are just not migratory in the nature of federally regulated migratory wildlife. They do not travel from Canada to Central America as do ducks, geese and doves. Nor do they spend several years of their lives in the depths of the Pacific Ocean as do the fur seal and the salmon. To call horses that spend their entire lives in a small geographical area bisected by a stateline migratory, would lead to the conclusion that the commuters in some of our large metropolitan areas—Chicago, Illinois-Gary, Indiana; New York, New York-Stamford, Connecticut; Kansas City, Missouri-Kansas City, Kansas—are migratory.

CONCLUSION

The Central Committee and the Shoshone Tribe believe that Nevada should be able to control estrays, diseased animals, fish and game, and promote range management within the boundaries of Nevada. Should these obvious rights under the state's police powers be stripped, state sovereignty is necessarily questioned.

The fears of Nevada (86% federally owned) and New Mexico (34% federally owned) were expressed by Justice White in *Ward* v. *Race Horse, supra,* at 514, in answering an Indian's claim that treaty hunting rights extended to all "public lands" within Wyoming:

> The power of all the states to regulate the killing of game within their borders will not be gainsaid, yet, if the treaty applies to the unoccupied land of the United States in the State of Wyoming [Nevada, New Mexico], that state would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner, so long as it continued to be unoccupied land, would be exempt in this regard from the authority of the state. Wyoming [Nevada, New Mexico] then, *will have been admitted into the Union, not as an equal member,* but as one shorn of a legislative power vested in all the other states of the Union, a power resulting from the fact of statehood and incident to its plenary existence. (Emphasis added).

Nevada's Enabling Act, 13 Stat. 30-32 (1864) provides that Nevada ". . . shall be admitted into the Union upon an equal footing with the original states, in all respects whatsoever."

Respectfully submitted,

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APPENDIX A

Pertinent parts of N.R.S. Chapters 569 and 571 provide as follows:

569.005 *Definitions*

. . .

2. "Estray" means any livestock running at large upon public or private lands in the State of Nevada. . .

3. "Livestock" means:

. . .

(b) All horses, mules, burros and asses or animals of the equine species;

569.010 *Estrays deemed property of state department of agriculture; disposition of moneys collected for sales, injuries or killing.*

1. Except as otherwise provided by law, all estrays within the State of Nevada shall be deemed for the purpose of this section to be property of the department.

571.120 *Duties of state department of agriculture.* The department shall do all things necessary for the control and eradication of infections, contagious or parasitic diseases of livestock.

571.240 *Inspection of livestock about to be removed from state.*

1. Inspectors may inspect any or all livestock about to be shipped, driven, transported or otherwise removed from the state.

APPENDIX B

Qualifications for membership to the state grazing boards prior to the 1975 amendment were:

568.060 *State grazing boards: members; chairman; qualifications.* The members and the chairman of each of the state grazing boards shall be the members and chairmen of each of the boards of district advisors of each grazing district elected, qualified and serving under the provisions of the Taylor Grazing Act and the regulations promulgated under the provisions of that act, except that membership on such state boards shall be limited to residents of the State of Nevada.

Qualifications for membership subsequent to the 1975 amendment of the Nevada Legislature will be:

568.060 1. The members and the chairman of each of the state grazing boards for the year 1975 shall be the members and chairmen of each of the boards of district advisors of each grazing district elected, qualified and serving on July 1, 1975, under the provisions of the Taylor Grazing Act and the regulations promulgated under the provisions of that act except that membership on such state boards shall be limited to residents. Such members shall serve until their successors are elected and qualified as provided in this section.

2. On and after January 1, 1976, each state grazing board shall consist of not less than five nor more than twelve stockmen who graze livestock upon the public lands within the grazing district for which such state grazing board is created. Officers and directors

of corporations and partners of partnerships which conduct such grazing are qualified to be elected to serve on such boards on behalf of such corporation or partnership. The term of each member is 3 years, beginning on January 1 next after his election.

See Advance Sheets, 1975 Nevada Stats. Chapter 386.

Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 74-1488

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR,
Appellant,

vs.

STATE OF NEW MEXICO, et al.,
Appellees.

On Appeal from the United States District Court for the District of New Mexico

BRIEF OF PACIFIC LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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Subject Index

	Page
Interest of amicus	1
Opinion below	3
Introduction	3
Argument	4
I The Act exceeds the limits of the powers granted by the Property clause	4
II The Act is not grounded on the powers granted by the Commerce clause	8
III The Act infringes the powers reserved to the states by the Tenth Amendment	12
Conclusion	16

Table of Authorities Cited

Cases	Pages
Afroyim v. Rusk, 387 U.S. 253 (1967)	3
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)	6
Carey v. South Dakota, 250 U.S. 118 (1919)	14
District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975)	12, 13
Fry v. United States, ... U.S. ..... n.7, 95 S.Ct. 1792	12, 13
Geer v. State of Connecticut, 161 U.S. 519 (1896)	5, 14, 15
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)	10

	Pages
Katzenbach v. McClung, 379 U.S. 294 (1964)	10
Lacoste v. Department of Conservation, 263 U.S. 545 (1924)	14
Maryland v. Wirtz, 392 U.S. 183 (1968)	12
Missouri v. Holland, 252 U.S. 416 (1920)	5
Toomer v. Witsell, 334 U.S. 385 (1948)	14

Constitutions

United States Constitution:
- Article I, Section 8, Clause 3 ..... 8, 9, 10, 11, 13, 14
- Article IV, Section 3, Clause 2 ..... 3, 4, 6, 7, 9, 11
- Tenth Amendment 12, 13

Legislative Reports

Cong. Rec. H. 9058 (1971)	6
H.R. Rep. No. 480, 92d Cong., 1st Sess. 10-12 (1971)	6
S. Rep. No. 242, 92d Cong., 1st Sess. 1 (1971)	6, 11

Rules

Supreme Court Rules:
- Rule 42 1

Statutes

16 U.S.C.A.:

Section 1333	9
Section 1334	8, 15
Wild and Free-roaming Horses and Burros Act, 85 Stat. 649-651, 16 U.S.C. §§ 1331-1340	2

Texts

Webster's, New Instructional Dictionary of the English Language (2nd Edition 1954)	5

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INTEREST OF AMICUS

This brief *amicus curiae* on behalf of Pacific Legal Foundation (hereinafter PLF) is respectfully submitted pursuant to Supreme Court Rule 42, consent to the filing of this brief having been granted by counsel for Appellant Secretary of the Interior (hereinafter Secretary) and by counsel for Appellees State of New Mexico, *et al.* (hereinafter New Mexico).

PLF has previously filed with this Court an *amicus* brief in this case on the issue of dismissal of the appeal or summary affirmance. PLF believes that for the reasons stated herein, this Court should affirm the judgment of the United States District Court for the District of New Mexico.

PLF is a nonprofit, tax-exempt, public interest legal foundation duly organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is set by a Board of Trustees composed of concerned citizens. Ten of the 17-member Board are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where PLF's position has broad public support within the general community.

PLF has members, supporters and contributors whose land and property have been subjected to varying degrees of injury as a result of the blanket protection afforded the wild horses and burros under the terms of the Wild and Free-roaming Horses and Burros Act, 85 Stat. 649-651, 16 U.S.C. §§ 1331-1340. As a result of the legislation, the animals are completely unrestrained and are allowed to roam at will onto private property resulting in the destruction of crops, the depletion of food supplies provided for livestock, and the injury and harassment of livestock. While the Act has provisions for the regulation of these animals, these provisions have not been effectively utilized; and at the same time the States, which would be capable of effectively regulating the animals

so as to prevent these injuries, have been stripped of the power to do so by the Act. Thus, the private landowners have been subjected to invasions of their property rights without having any adequate means of remedying such injuries.

PLF is gravely concerned with the infringement of the sovereign powers of the State to control local wild animals and the consequent injury occurring to private landowners.

OPINION BELOW

The three-judge United States District Court for the District of New Mexico, in an opinion not yet reported, declared the Act to be unconstitutional. Specifically, the district court held that wild and free-roaming horses and burros were not property over which the Federal Government could exercise dominion and control under Article 4, Section 3, Clause 2, of the United States Constitution.

INTRODUCTION

It is a familiar rule of construction of the Constitution that Congressional powers do not exist in the absence of a specifically enumerated power granted by the provisions of the Constitution itself. In *Afroyim v. Rusk,* 387 U.S. 253, 257 (1967), this Court delineated the limits of Congressional power:

> "Our Constitution governs us and we must never forget that our Constitution limits the Govern-

ment to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones."

Thus, in order for an act to be valid, it must be grounded on a specifically enumerated power.

ARGUMENT

I

THE ACT EXCEEDS THE LIMITS OF THE POWERS GRANTED BY THE PROPERTY CLAUSE

The Secretary's initial argument[1] is that the Wild Free-roaming Horses and Burros Act (hereinafter Act) is constitutional under the Property Clause, Article IV, Section 3, Clause 2 of the United States Constitution. That Clause provides in part:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."

In order to reach a determination that the enactment by Congress was authorized by the Property Clause, it is necessary to conclude that wild horses and burros come within the purview of that which was intended to be a proper subject matter for regulation by the section. That wild horses and burros do not is clear.

Initially, it is apparent from the language of the Clause that the powers created by the section are

[1]Brief at 12-20.

applicable only to territories or other property "belonging to the United States." The fact that the provisions' applicability is limited to property *belonging to* the government is crucial. Property is simply that over which someone exercises dominion and control to the exclusion of others. Webster's, *New Instructional Dictionary of the English Language* (2d ed. 1954). Traditionally, wild animals *(ferae naturae)* have been viewed as the antithesis of property; they are "wild" because no dominion and control is exercised over them. Thus, "wild birds [and presumably horses and burros] are not in the possession of anyone; and possession is the beginning of ownership." *Missouri v. Holland,* 252 U.S. 416, 434 (1920). It is for this reason that wild animals, being incapable of ownership, have been considered as a natural resource of the State in which they are found to exist and are to be held in trust by that State for the benefit of all citizens. This Court has stated:

> "We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor but in its sovereign capacity, as the representative and for the benefit of all its people in common." *Geer v. State of Connecticut,* 161 U.S. 519, 529 (1896).

The Act does not provide the Secretary with the power to sell, convey title, or transfer legal ownership of the animals, which are common incidences of ownership. The legislative history reveals that it was the conclusion of Congress that the wild free-roaming horses and burros belonged "to no one individual.

They belong to all the American people." S. Rep. No. 242, 92d Cong., 1st Sess., at 1 (1971). "They are not claimed as property of the Federal Government." Cong. Rec. H. 9058 (1971).

Thus the United States recognized its inability to exercise dominion and control over the wild horses and burros and by its own admission stated that it does not have ownership of these animals, but rather is merely exercising jurisdiction over them. No provision is made in the Act for transfer of ownership, and specific sales provisions and limitations were dropped from earlier versions of the Act. H.R. Rep. No. 480, 92d Cong., 1st Sess., at 10-12 (1971).

Provisions expressly omitted by the Congress cannot be read into the final enactment of the legislation. Thus, in the absence of a showing that wild horses and burros are property belonging to the government, the Property Clause by its own terms is inapplicable.

In addition to the ownership deficiency, there are other difficulties in relying on the Property Clause to provide the power to enact this legislation. Historically, the Property Clause has been construed as empowering Congress to enact legislation relating to public lands; that is, real property. It is true, as the Secretary contends, that the powers created by the Clause have been expanded to include the regulation of that which the land contains. (*Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 333 (1936).) But the Secretary is incorrect in his assumption that because Congress has been empowered, pursuant to the powers created by the Property Clause, to regu-

late what the land contains, it may also regulate non-public lands and in addition anything that comes into contact with public lands. In those cases, wherein the power to regulate has been extended to that which the land contains, a clear pattern can be shown to exist. The power exists in accordance with those rights that are typically considered common incidences of real property ownership; that is, the regulation of mineral and riparian rights. In no instance has the power been extended to include the regulation of any object that is shown to be physically present on public lands in the absence of a showing that the regulation is necessary to protect and preserve the public lands. As the Court below noted:

> "The common thread running through the cases decided under the Territorial Clause is that of *protection* of the public lands from damage of some kind. [Citation omitted.]
>
> "There is no Congressional finding nor any evidence to indicate that wild horses and burros are damaging the public lands. The statute is aimed at protecting the wild horses and burros, not at protecting the land they live on. Thus, we find that the Wild Free-roaming Horses and Burros Act cannot be sustained as an exercise of the power granted to Congress in Art. IV, § 3 of the Constitution." *New Mexico v. Morton,* Mem. Dec. at 5. (Emphasis in original.)

One final point deserves attention when considering the attempt by Congress to base the Act on the powers created by the Property Clause. As stated above, the Clause provides Congress with the power to regulate "territories or other property belonging to the

United States." Congress has clearly exceeded any power which is vested in it by the terms of the Clause, even should it be found to have the power to regulate wild horses and burros on federal land, in extending the terms of the Act to include regulation of wild horses and burros on State and private lands.[2] The power created to regulate federally-owned public lands simply cannot be extended to regulate non-federal lands.

II

THE ACT IS NOT GROUNDED ON THE POWERS GRANTED BY THE COMMERCE CLAUSE

The Secretary's secondary contention that the authority for enacting the legislation regarding wild horses and burros can be found in the Commerce Clause[3] is without merit.

Initially, it is clear from the congressional findings and the policy behind the Act (Title 16, United States Code, Sections 1331-1340), as noted by the Court below, that the Act is grounded on the Property Clause. Section 1331 provides that:

> "Congress finds and declares that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and burros are fast disappearing from the American scene. It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; *and to accomplish this they are to be considered* in the area where presently found, as *an integral part of the natural system of the public lands.*" (Emphasis added.)

[2] *See* 16 U.S.C.A. § 1334.

[3] U.S. Const. Art. I, § 8, Cl. 3.

Section 1333 authorizes and directs the Secretary to protect and manage wild free-roaming horses and burros "as components of the public lands." The absence of any mention of a reliance on the Commerce Clause is significant. It was the clear intent of Congress, as can be seen from a reading of the Act, to consider wild horses and burros as a part of the public lands and therefore subject to the regulatory powers created under the Property Clause.

Although Congress is granted the power to regulate commerce, that power must be consciously exercised. And it may not be exercised, without the express intent of Congress, by an administrative agency as an exercise in *post hoc* litigation strategy. As the court below stated:

> "The Government argues in its brief that the Act may be sustained as an exercise of the power granted in the Commerce Clause. No evidence was presented to support this theory . . . . Further, the Congress made no findings to indicate that it was in any way relying on the Commerce Clause in enacting this statute. This argument must fail." *New Mexico v. Morton,* Mem. Dec. at 6.

The cases cited by the Secretary in support of the premise that it is not necessary to establish a con-

gressional finding that the Commerce Clause has been relied on are distinguishable from the present case. Although there is language in *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964), and *Katzenbach v. McClung,* 379 U.S. 294 (1964), suggesting that it is unnecessary for Congress to make a particularized finding that commerce has been affected or that it is relying on the Commerce Clause, the Secretary has ignored the fact that in each of these cases the legislative history evidenced in detail the burdens on commerce. This Court stated in *Heart of Atlanta Motel* at 252:

> "While the Act as adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens . . . upon interstate commerce."

In *Heart of Atlanta Motel* the court made specific reference to hearings before the Senate Committee on Commerce and various other congressional reports wherein it was made clear that burdens on commerce were present and that the Commerce Clause had been relied on. Thus, it was unnecessary to include a particularized finding to that effect in the final legislation itself.

The same is true of *Katzenbach v. McClung, supra* at 299. This Court held that:

> "[W]hile no formal findings were made, which of course are not necessary, it is well that we make mention of the testimony at these hearings. . . . The record is replete with testimony of the burdens placed on interstate commerce by racial discrimination in restaurants."

It is clear that in the cases wherein it was stated that no finding of reliance on the Commerce Clause was necessary, the record was replete with evidence that Congress was relying on the Commerce Clause. There is no indication of such reliance in the present case. In fact, all the evidence is to the contrary. It is true that Congress exhibited a concern for the welfare of the wild horses and burros in the reports cited by the Secretary; but it is also true that this concern, which was subsequently manifested in the legislation, was based on a finding that the wild horses and burros were an integral part of the public lands and therefore subject to the regulatory powers of the Property Clause.

The conclusion that Congress relied on the Property Clause and not the Commerce Clause is inescapable. It is repeatedly stated throughout the congressional records that the intent and primary purpose of the Act was the protection of wild horses and burros from man; and this was to be accomplished by considering the animals an integral part of the natural ecological system of the public lands (S. Rep. No. 242, 92d Cong., 1st Sess., at 1 (1971)). It was not stated that the protection of the animals was to be accomplished pursuant to the power to regulate interstate commerce.

III

THE ACT INFRINGES THE POWERS RESERVED TO THE STATES BY THE TENTH AMENDMENT

The Tenth Amendment to the United States Constitution provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In *District of Columbia v. Train,* 521 F.2d 971 (D.C. Cir. 1975), the court recently considered the issue of the limitations placed on the commerce power by the Tenth Amendment:

> "Although this [tenth] amendment does not on its face purport to place any limitation on the exercise of powers delegated to the federal government by the commerce clause, the Supreme Court recently observed that it does have some substantive meaning:
>
> > 'While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," *United States v. Darby,* 312 U.S. 100, 124 (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.'
>
> *Fry v. United States,* ..... U.S. at ..... n.7, 95 S.Ct. [1792] at 1795 n.7." *Id.* at 993.

The court continued with a discussion of *Maryland v. Wirtz,* 392 U.S. 183, 196 (1968), wherein it was

noted that the limits inherent in the Commerce Clause gave the Court "ample power to prevent what the appellants purport to fear, 'the utter destruction of the State as a sovereign political entity.' "

It was therefore the conclusion of the court, based on the Supreme Court's interpretation of the Commerce Clause powers in *Fry,* that:

> "[T]he extent of federal intrusion into state sovereignty is of some relevance even where the federal regulations are an exercise of the commerce power. Since the Tenth Amendment was described in *Fry* as declaring 'the constitutional policy that Congress may not exercise power *in a fashion* that impairs the States' integrity or their ability to function in a federal system,' the restrictions may be directed to the manner in which the federal government exercises its commerce power. In other words, the Tenth Amendment may prevent Congress from selecting methods of regulating which are 'drastic' invasions of state sovereignty where less intrusive approaches are available." *District of Columbia v. Train, supra* at 994. (Emphasis in original.)

In the absence of a showing that the Constitution has granted to Congress the power to regulate wild horses and burros, or in the alternative, in the absence of a showing that the States have been prohibited by the Constitution from exercising the power to regulate wild horses and burros, the Tenth Amendment grants such powers of regulation to the States. Having established that Congress lacked the power to enact the legislation, the attempts by Congress to regulate wild horses and burros constitute an in-

fringement of the sovereign powers reserved to States and the people.

This Court has traditionally held that the power to regulate wild animals is reserved to the States, indicating that, insofar as wild animals within a State are capable of ownership, they are owned by the State in its sovereign capacity for the benefit of its people. (*Lacoste v. Department of Conservation,* 263 U.S. 545 (1924); *Geer v. State of Connecticut,* 161 U.S. 519 (1896); *Carey v. South Dakota,* 250 U.S. 118 (1919).) The theory of placing legal ownership in the States—although the ownership concept is merely a legal fiction—continues to be utilized as a method of establishing the regulatory powers of the States with regard to wild animals. *Toomer v. Witsell,* 334 U.S. 385, 402 (1948).

The Secretary's contention that he has the authority to regulate wild horses and burros based on the powers delegated to Congress by the Commerce Clause contravenes the case law established by this Court in *Geer v. Connecticut,* 161 U.S. 519 (1896). The Federal Government cannot, pursuant to the powers delegated to it by the Commerce Clause, deprive the States of the power to regulate wildlife. In *Geer, supra* at 534, this Court held that since the States hold title to wild animals for the benefit of all the inhabitants of the State, wild bird and animal life was excluded from the operation of the Commerce Clause. As this Court there noted:

> "The right to preserve game flows from the undoubted existence in the state of a police power to that end, which may be more the less efficiently called into play because by doing so interstate commerce may be remotely and indirectly affected." *Geer* at 534.

The problems created by the current wild horses and burros situation clearly represent an instance in which regulation is more appropriately left to the States. The Federal Government is ill equipped to deal with the difficulties stemming from the presence of wild horses and burros on private property. Reviewing the problems that are caused by the wild horses and burros, it becomes clear that many are of a peculiarly local character. Private landowners have been subjected to invasions of their property rights and have been left without an effective method of remedying the injuries sustained. *New Mexico v. Morton,* Mem. Dec. at 1-2. It has been found that the wild horses and burros enter private property resulting in the destruction of feed provided for livestock and the harming or disturbing of livestock. *Id.* at 2. Although there is a procedure provided in the Act for occurrences of this nature whereby the Bureau of Land Management or federal marshals are to be called for assistance, 16 U.S.C.A. § 1334, the implementation of the provision has not been successful. The Bureau of Land Management has not been able to respond effectively to the requests for assistance (Mem. Dec. at 2). Thus, it becomes apparent that the most effective method of eliminating the damage occurring to private property is to retain the regulatory powers in the governmental entity most

capable of dealing with the problem. In this case it is clear that the State or local government, because of its knowledge of the problems and its ability to respond quickly, is best suited to regulate effectively the wild horses and burros and prevent damage to the property of its citizens.

CONCLUSION

The Secretary has failed to show any constitutional authority for the Act. Therefore, PLF, as *amicus curiae,* urges that the decision of the district court be affirmed.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74–1488

ROGERS C. B. MORTON,
SECRETARY OF INTERIOR,
Appellant,

v.

STATE OF NEW MEXICO, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

BRIEF OF AMICUS CURIAE NEVADA STATE BOARD OF AGRICULTURE

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INDEX

PAGE

Opinion Below..... 1

Jurisdiction..... 1

Constitutional Provisions and Statutes Involved..... 2

Consent..... 2

Interest of Amicus Curiae..... 3

Statement of the Case..... 4

Question Presented..... 4

Argument..... 4

Conclusion..... 9

CITATIONS

Cases:

Alabama v. Texas,
347 U.S. 272 (1954)..... 8

Ashwander v. Tennessee Valley Authority,
297 U.S. 288 (1936)..... 7

Geer v. Connecticut,
161 U.S. 519 (1896)..... 5, 9

Hackett v. California Laundry,
7 Cal.App.2d 757, 45 P.2d 833 (1935)..... 7

Lacoste v. Department of Conservation,
263 U.S. 545 (1924)..... 6

People v. Couch,
77 Ill.App.2d 290, 222 N.E.2d 46 (1966)..... 7

Missouri v. Holland,
252 U.S. 416 (1920)..... 8

Toomer v. Witsell,
334 U.S. 385 (1948)..... 6

United States v. Brown,
384 F.Supp. 1151 (E.D. Mich. 1974)..... 8

United States v. California,
332 U.S. 19 (1947)..... 8, 9

United States v. Kambeitz,
256 F. 247 (N.D.N.Y. 1919); affirmed
262 F. 378 (2nd Cir. 1919) 8

Wells v. Ward,
207 S.W.2d 698 (Tex.Civ.App. 1948) 7

Constitution and Statutes:

U.S. Const. Art. IV, Section 3, Clause 2 ..... 2, 4, 5

U.S. Const. Amend. X 2, 9

Nevada's Enabling Act,
13 Stat. 30–32 (1864) 2, 9

Wild Free-Roaming Horses and Burros Act,
85 Stat. 649–651, 16 U.S.C. (Supp. III) 1331–1340 ..... 2, 4

28 U.S.C. 1252–1253 1

Nevada Revised Statutes:

N.R.S. 561.045 3

N.R.S. 561.055 3

N.R.S. 561.105 3

N.R.S. Chapter 569 3

N.R.S. Chapter 571 3

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OPINION BELOW

The opinion of the District Court is not yet reported and appears as Appendix A in the Appellant's Jurisdictional Statement.

JURISDICTION

The jurisdiction of this Court was invoked by the Appellant under 28 U.S.C. 1252 and 1253 and is not questioned by this Amicus.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article IV, Section 3, Clause 2, of the United States Constitution (the "Property Clause") provides in part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

2. Amendment X, of the United States Constitution (the reserved "Police Powers") provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

3. The Wild Free-Roaming Horses and Burros Act, 85 Stat. 649–651, 16 U.S.C. (Supp. III) 1331–1340, enacted December 15, 1971, is reproduced in Appendix F of the Appellant's Jurisdictional Statement.

4. Act of Congress enabling the People of the State of Nevada to Form a Constitution and State Government, 13 Stat. 30–32 (1864), provides in part:

> That the inhabitants of that portion of the territory of Nevada included in the boundaries hereinafter designated be, and they are hereby, authorized to form for themselves, out of said territory, a state government, with the name aforesaid, which said state, when formed, shall be admitted into the Union upon an equal footing with the original states, in all respects whatsoever.

CONSENT

The Board of Agriculture being a statutory board of the State of Nevada sponsored by the Attorney General of Nevada permissibly appears with the consent of the Appellees pursuant to Rule 42(4) of the Supreme Court Rules.

INTEREST OF AMICUS CURIAE

The State Board of Agriculture is a statutory board of the State of Nevada, created pursuant to Nevada Revised Statutes (NRS) 561.045, with the express duties of keeping informed and advising the Governor and Legislature on agricultural and livestock matters affecting Nevada, and to formulate policy for the State Department of Agriculture, NRS 561.105. Such a public charge includes, as the governing body of the State Department of Agriculture, management and enforcement of Nevada's estray laws, NRS Chapter 569, and diseased animal laws, NRS Chapter 571.

The Board of Agriculture is made up of members appointed by the Governor, NRS 561.045, all of which are to be actively engaged in agriculture, NRS 561.055.

Having the trust and charge of the people on all areas of agriculture, livestock and range management within the State of Nevada, the Board of Agriculture has a deep interest in having the Appellees' position affirmed. At stake is the local control and sovereignty of Nevada in dealing with local problems affecting her agriculture and livestock production, a large segment of Nevada's economy, as well as the State's wildlife. Any position less than total affirmation of the court below could cast serious aspersions on this Amicus' authority to continue serving Nevada by carrying out its statutory duties on the vast majority of lands within the State and would deal a damaging blow to the economy of the State. Nevada, being composed of 86% federally owned land, is second only to Alaska in such a percentage of federal ownership.

Hence the outcome of this litigation is of extreme importance to the State of Nevada and its State Board of Agriculture.

STATEMENT OF THE CASE

This Amicus Curiae adopts the Statement of the Case made by the Appellees.

QUESTION PRESENTED

Whether a Three-Judge Federal District Court correctly held the Wild Free-Roaming Horses and Burros Act unconstitutional as exceeding the power of Congress to protect federal lands and as infringing on the "Police Powers" reserved to the states.

ARGUMENT

THE WILD FREE-ROAMING HORSES AND BURROS ACT IS UNCONSTITUTIONAL, EXCEEDING THE POWER OF CONGRESS TO PROTECT FEDERAL LANDS AND INFRINGING ON THE "POLICE POWERS" RESERVED TO THE STATES.

In arguing for the constitutionality of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. (Supp. III) 1331–1340, Appellant relies primarily on the "Property Clause" of the Federal Constitution:

> The Congress shall have Power to dispose and make all needful Rules and Regulations respecting the Territory or or other *Property belonging to the United States;* and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State. U.S. Const., Art. IV, Section 3, Clause 2. (Emphasis added)

Appellant believes that the authority conferred by this language

on the United States with respect to the public lands of the United States somehow gives the federal government authority to regulate and protect wild animals which happen to be on said lands while historically the regulation and protection of wild animals has been considered by the law to be within the special province of the states.

An excellent short summary of the law of wild animals appears in *Geer v. Connecticut*, 161 U.S. 519 (1896) at 527–528:

> The practice of the government of England from the earliest time to the present has put into execution the authority to control and regulate the taking of game.
> Undoubtedly, this attribute of government to control the taking of animals *ferae naturae*, which was thus recognized and enforced by the common law of England, was vested in the colonial governments, where not denied by their charters or in conflict with grants of the royal prerogative. It is also certain that the power which the colonies thus possessed passed to the states with the separation from the mother country and remains with them at the present day, insofar as its exercise is not incompatible with, or restrained by, the rights conveyed to the federal government by the Constitution.

This being the legal framework around which the Constitution was drafted and finally approved by the original thirteen states, it is inconceivable to think the framers intended the "Property Clause" to work a transfer to the federal government of a power clearly resting in the various states vis-a-vis wild animals without more precise language than that appearing in Article IV, Section 3, Clause 2 of the Constitution.

When the union of states occurred and for many decades thereafter, wild game of all types served as a source of food and other items of necessity. This Amicus believes the various states, which history has recorded as being extremely jealous of their powers and cautious in their attitude towards the new central government,

would not surrender their sovereignty rights in animals *ferae naturae* in the manner now suggested by Appellant.

Recognition of the paramount interests of the states in such animals has been given by this Court and the lower federal courts on numerous occasions. For instance, in *Lacoste v. Department of Conservation*, 263 U.S. 545 (1924), the common law rights of the states were described at page 549 as follows:

> The wild animals within its borders are, so far as capable of ownership, *owned by the state in its sovereign capacity*, for the common benefit of all people. (Emphasis added)

And in recent years this court reiterated its long standing position on this matter in the case of *Toomer v. Witsell*, 334 U.S. 385 (1948):

> A state may care for its own [resources] in utilizing the bounties of nature within her border, because it has technical ownership of such bounties or, when ownership is in no one, because the state may for the common good exercise all the authority that technical ownership ordinarily confers. When the Constitution was adopted, such, no doubt, was the common understanding regarding the power of states over its fisheries, and it is this common understanding that was reflected in *McCready v. Virginia*, 94 U.S. 391, 24 L.Ed. 248. The McCready case is not an isolated decision to be looked at askance. It is the symbol of one of the weightiest doctrines in our law. It expressed the momentum of legal history that preceeded it, and around it in turn has clustered a voluminous body of rulings. Not only has a host of state cases applied the McCready doctrine as to the power of the states to control their game and fisheries for the benefit of their own citizens * * *. Concurring opinion of Justice Frankfurter, supra, 408–409.

It is noteworthy that the above position has never been repudiated by this Court and many state and federal decisions continue to apply these doctrines in appropriate cases.

Appellant in his Brief on the Merits has rather cavalierly ignored the actual language of the "Property Clause" which refers to "Property belonging to the United States". See Appellant's Brief of the Secretary of the Interior, page 15, footnote 17.

This Amicus believes the above quoted language is of great importance in the decision of the matter now before this Court, and it further believes this language must be taken to mean just what it says, i.e. the property over which this section of the Constitution confers legislative authority on the Congress is only that property which properly belongs to the United States.

The phrase "belonging to" has been judicially defined as connoting title or ownership or other substantial proprietary interest. *People v. Couch*, 77 Ill.App.2d 290, 222 N.E.2d 46 (1966); *Wells v. Ward*, 207 S.W.2d 698 (Tex.Civ.App. 1948); *Hackett v. California Laundry*, 7 Cal.App.2d 757, 45 P.2d 833 (1935).

The United States can legally claim no title or ownership rights in the wild horses and burros which are included in the Act here under review. On the contrary, as this Court stated in *Toomer*, supra, wild animals so far as capable of ownership are owned by the states in their sovereign capacity. This was so at the formation of the Union and it remains so today.

Cases cited by Appellant, such as *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), for the proposition that Congress' powers under the "Property Clause" extend to "what the land contain(s)" have no application to animals which merely roam upon federal land. Such presence does not convert these animals into public land or other federal property, nor does it make of them products of public land.

Lower federal courts have for years recognized that the federal government must have a true property interest in a thing before the "Property Clause" may be called into question. In *United States*

v. Brown, 384 F.Supp. 1151 (E.D. Mich. 1974), the District Court at 1157 stated the rule to be:

> * * * for the property clause to be properly invoked as a basis for congressional enactment, some *actual and substantial property interest* of the federal government must be involved. (Emphasis added)

See also *United States v. Kambeitz*, 256 F. 247 (N.D.N.Y. 1919); affirmed 262 F. 378 (2nd Cir. 1919).

And finally the case of *Alabama v. Texas*, 347 U.S. 272 (1954) implies a congressional power over public property arises due to a proprietary interest in the property in question.

Lacking any title in or ownership or proprietary rights to wild horses and burros there is no "Property belonging to the United States" over which the "Property Clause" in the Constitution can confer any legislative jurisdiction to the Congress for enactment of the Wild Free-Roaming Horses and Burros Act.

Appellant has cited *Missouri v. Holland*, 252 U.S. 416 (1920) and *United States v. California*, 332 U.S. 19 (1947) as alleged authorities for the proposition that the federal government has paramount authority over all types of wildlife which happen to be found on the public domain, even though it does not own the animals themselves or have a proprietary interest in them. Each of these cases, however, is clearly distinguishable from the one presently before this Court and as such offers no real support for Appellant's position.

Missouri v. Holland, supra, did not even involve the "Property Clause", but instead arose under and was decided solely on the treaty making powers of the federal government. In addition, the wild birds involved in that particular case were highly transitory, moving within a matter of a few hours or days between states and even between nations, thus creating a problem which was national

and even international in scope. None of these elements is present in the case now before the Court.

As for *United States v. California*, supra, the decision therein turned on the fact that the right being claimed by the State of California was not one acquired from the mother country and retained by the original states, which contrasts sharply with the situation present in this case and the settled doctrine expressed in *Geer v. Connecticut*, supra.

In short, there is no basis in law for Appellant's position that the "Property Clause" of the Constitution confers authority on Congress to enact a law like the Wild Free-Roaming Horses and Burros Act. The District Court in New Mexico properly saw that this was indeed the situation; this Court must do no less. Otherwise, the continued legitimacy of dozens of state fish and game laws, estray laws, and diseased animal laws of all the 50 states will be put in considerable doubt, laws enacted and enforced over the years as the result of a body of law extending back several centuries. In this our Bicentennial Year, this Court should be particularly careful to insure that due recognition is extended to the powers belonging to the states.

CONCLUSION

Amendment X to the federal Constitution was adopted to insure that the states and/or the people reserved to themselves any and all powers not given to the federal government. The powers retained by the original states are the same powers which Nevada, the 36th State, may enjoy. This point is merely emphasized by the provisions of the enabling act for creation of the State of Nevada, 13 Stat. 30–32 (1864) which provides that Nevada "* * * shall be admitted into the Union upon an equal footing with the original states, in all respects whatsoever." Should any of the powers of

Nevada or New Mexico or their sister states be eliminated with respect to the control of estrays, diseased animals, fish and game and range management through the sanctioning of legislation such as the Wild Free-Roaming Horses and Burros Act, state sovereignty will necessarily be put in question.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES
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ROGERS C. B. MORTON, SECRETARY OF INTERIOR,
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STATE OF NEW MEXICO, ET AL.,
Appellees.

On Appeal From the United States District Court for the District of New Mexico

BRIEF OF AMICI CURIAE STATE OF WYOMING WYOMING LIVESTOCK BOARD

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INDEX

Preface 1
Opinion Below 1
Jurisdiction 2
Constitutional Provisions and Statutes Involved 2
Consent 2
Interest of Amici Curiae 3
Statement of the Case 4
Question Presented 4
Introduction and Summary 4,5,6
Argument 7
Conclusion 7
Appendix A—Pertinent Parts of W.S. 11-498 through 11-515 8,9

Citations—Constitution and Statutes

U.S. Const. Art IV Section 3 2
U.S. Const. Amend. X 2,7
Wild Free-Roaming Horses and Burros Act, 16 USC (Supp. III) 1331—1340 2,3,4,5,6,7
28 USC 1252—1253 2
Wyoming's Enabling Act 26 Stat. 222 (1890) 2
Wyo. Const. Art. 19, Section 1 3
W.S. 11-261 3
W.S. 11-263(5) 3
W.S. 11-319 thru 11-392 3
W.S. 11-498 thru 11-515 3,5,6

Miscellaneous

Inventory Report on Real Property Owned by the United States Throughout the World, June, 1974, GS1.15, 1974,

559A, Table 4, Comparison of federally owned land with total acreage of states. 4
U.S. Bureau of Census, Census of Population: 1970. GENERAL, SOCIAL AND ECONOMIC CHARACTERISTICS, Final Report PC(1)-C52, Wyoming, United States Government Printing Office, Washington, D.C. 1971. 3
Wyoming State Report, Meeting of National Advisory Board on Wild Free-Roaming Horses and Burros, Reno, Nevada, September 18, 19, and 20, 1974. 6

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-1488

ROGERS C.B. MORTON, SECRETARY OF INTERIOR,
Appellant,
vs.
STATE OF NEW MEXICO, ET AL.,
Appellees.

On Appeal From the United States District Court for the District of New Mexico

BRIEF OF AMICI CURIAE STATE OF WYOMING WYOMING LIVESTOCK BOARD

PREFACE

The State of Wyoming, along with all western states, is concerned with the federal intrusion into the control of its livestock industry. This Amicus Brief will not attempt to restate or add to the legal arguments as put forth in the Appellees' Brief filed by the State of New Mexico or the Amicus Brief of the Central Committee of Nevada State Grazing Boards and the Duckwater Shoshone Tribe, but incorporates and endorses those arguments herein. The sole function of this Amicus Brief is to lend support to the Appellees' position by stating the factual situation as it exists in Wyoming and as it is germane to the case at bar.

OPINION BELOW

The opinion of the District Court is not yet reported and appears as Appendix A in the Appellant's Jurisdictional Statement.

JURISDICTION

The jurisdiction of this Court was invoked by the Appellant under 28 U.S.C. 1252 and 1253 and is not questioned by the Amici.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article IV, Section 3 of the United States Constitution (the "Property Clause") provides in part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any Claims of the United States, or of any particular State.

2. Amendment X, of the United States Constitution (the reserved "Police Powers"), provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

3. The Wild Free-Roaming Horses and Burros Act, 85 Stat. 649-651, 16 U.S.C. (Supp. III) 1331-1340, enacted December 15, 1971, is reproduced in Appendix F of the Appellant's Jurisdictional Statement.

4. Act of Congress (1890) Admitting the State of Wyoming into the Union (26 Statutes at Large 222, Chap. 664) provides in part:

> Be it enacted, etc., that the State of Wyoming is hereby declared to be a state of the United States of America and is hereby declared admitted into the Union on an equal footing with the original states in all respects whatever; and that the Constitution which the people of Wyoming have formed for themselves be and the same is hereby accepted ratified and confirmed.

CONSENT

Both the State of Wyoming and the Wyoming Livestock Board appear with the consent of the Appellant and Appellees

pursuant to Rule 42(1) of the Supreme Court Rules.

INTEREST OF AMICI CURIAE

The livestock industry has been and is now the principle industry of the State of Wyoming. According to the 1970 Department of Commerce, Bureau of Census, statistics[1], more Wyoming people are employed in the agriculture industry than in any other single industry including mining, construction and manufacturing[2]. The Wyoming Constitution provides that the Legislature "...shall pass all necessary laws to provide for the protection of livestock against the introduction and spread of...infectious or contagious diseases," and that the Legislature "...shall also establish a system of quarantine or inspection and such other regulations as may be necessary for the protection of stock owners and most conducive to the stock entrance within the state." Article 19, Section 1, Wyoming Constitution.

The Wyoming Livestock Board (hereinafter Board), composed of seven stockmen appointed by the Governor (W.S. 11-261), is charged with the duty of promulgating and enforcing rules, regulations and orders for the inspection, testing or quarantining all livestock (W.S. 11-263(5)). The Board also administers the brand and inspection laws of the State (W.S. 11-319 thru 11-392) and the Estray laws (W.S. 11-498 thru 11-515).

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[1]U.S. Bureau of Census, Census of Population: 1970 GENERAL, SOCIAL AND ECONOMIC CHARACTERISTICS, Final Report PC(1)-C52, Wyoming, United States Government Printing Office, Washington, D.C. 1971.

[2]Table 123,pp. 154 & 155 of the publication cited in Footnote #1 states that 12,286 persons were employed in the industry of agriculture, forestry and fisheries while 10,647 were employed in the mining industry, 8,511 in the construction industry, and 7,939 persons were employed in the manufacturing industry in Wyoming in 1970.

The State and the Board have a deep interest in having the Appellees' position affirmed. Loss of local control over the primary industry of the State could have catastrophic social and economic impact. Since forty-eight percent (48%)[3] of the total area of Wyoming is federally owned land and therefore subject to the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. (Supp. III) 1331-1340, 85 Stat. 649 (hereinafter referred to as the Act), and since the Act purports to exercise jurisdiction over all free-roaming wild horses and burros whether or not they be on public or private land, the federal legislation herein challenged exerts a major impact on the State of Wyoming and its livestock industry.

STATEMENT OF THE CASE

The Amici Curiae adopt the Statement of the Case made by the Appellees.

QUESTION PRESENTED

Whether a Three-Judge Federal District Court correctly held the Wild Free-Roaming Horses and Burros Act unconstitutional as exceeding the power of Congress to protect federal lands, and as infringing on the "Police Powers" reserved to the States.

INTRODUCTION AND SUMMARY

The broad expanse of range land in Wyoming provides an ideal climate for the uncontrolled herds of wild horses and burros. While the sight of a wild herd or a lone wild stallion prompts images of the rebellious western ethic of a pioneer time that deserves protection lest it be forever lost, the fact is that the subjects of the Act herein challenged are not in any sense an Endangered Species. They are horses and burros like any tame ranch and farm variety except for the fact that they inhabit their natural environment and display the behavior

[3]Inventory Report on Real Property Owned by the United States Throughout the World, June, 1974, GS1.15, 1974, 559A, Table 4, Comparison of federally owned land with total acreage of states.

that results from such an existence. Many members of such wild herds were at one time in their life domesticated animals. The herds are constantly replenished by reproduction and the introduction of strays and castaways from area agricultural operations. Most Federal, State and private authorities agree that the number of such animals is increasing, rather than "...fast disappearing from the American scene," as Congress was led to believe.

The problem with the loss of local control over the delicate balance between wild herds and domesticated livestock in Wyoming is that without the provisions of the State Estray laws relative to capture and control of such animals, the local rancher or farmer finds himself without an effective remedy to prevent disease and/or damage to his livestock. Apart from the constitutional issue that the Act intrudes into an area of traditional State control, the Act, as drawn, is incapable of dealing with the problem it seeks to remedy. The shortcomings of the Act as it applies to Wyoming were summarized by Dean T. Prosser, Jr., Chief Brand Inspector for the Wyoming Stock Growers Association, in his testimony before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs of the United States House of Representatives, August 12, 1975:

> "The Act provides authority for individuals to come and prove ownership of private animals on public lands and where located. The efforts made to gather private animals have been unsuccessful because of the rough terrain and the enormous expanse of the public domain. The only methods legally available at the present time are corralling by use of domestic horses or by trapping at water holes. The prohibition against use of aircraft or mechanized equipment in the capture of these animals has proven a large detriment to management of the animals as required under the Act. Originally it was estimated that privately owned horses could be removed within two years; however, it is now evident that under present legislation it may never be accomplished. Many claimants are reluctant to claim or attempt to gather

animals because of the trespass fees levied against them and because of their inability to remove the animals without the aid of motorized vehicles.

"The hard fact is that Congress, while charging the Secretaries of Interior and Agriculture with the management of these animals neglected to provide them with the tools necessary to do an effective job of such management. It is essential that wild horse populations be actively managed so that a fair balance of livestock, wildlife and horse and burro population is established and maintained under a true multiple-use concept."

At present it is estimated that there are 8,163 wild horses in the State of Wyoming with a projected population of 14,774 such animals in 1978.[4] The State Estray Laws provide for control over such wild herds to prevent spread of disease and damage to domesticated livestock and at the same time provide protection from wholesale roundup and slaughter that Congress feared when it passed the Act.

The emasculation of the State Estray Laws by the Act places the State of Wyoming and the Board in a helpless position. When a rancher complains that his privately owned mare has just been stolen by a wild stud or a highway patrolman reports that wild horses on the highway have been involved with or were the cause of a highway accident, the State is unable to act. The State of Wyoming and the Board believe that the law is clear that the states have the rights and obligations to control wildlife within their borders. Such control is imperative to the proper and orderly management of the livestock industry in Wyoming.

ARGUMENT

The State of Wyoming and the Wyoming Livestock Board as Amici Curiae adopt and endorse the legal arguments

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[4]Wyoming State Report, Meeting of National Advisory Board on Wild Free-Roaming Horses and Burros, Reno, Nevada, September 18, 19, and 20, 1974.

as set forth in the Brief of the Appellees filed by the State of New Mexico and the Brief of Amici Curiae Central Committee of Nevada State Grazing Boards and Duckwater Shoshone Tribe.

CONCLUSION

The Congress of the United States, acting on the false premise that wild horses and burros are "fast disappearing from the American scene," has sought to protect such animals with a totally unworkable law. The Act passed by Congress seeks to exercise dominion over animals which are the property of the State of Wyoming and over such animals whether they be on public or private lands. The State of Wyoming must be allowed to exercise its Police Power over these animals if they and the livestock industry of the State are to survive.

Respectfully submitted,

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APPENDIX A

Pertinent parts of W.S. 11-498 thru 11-515 provide as follows:

11-498. Definition. Any bovine animal, horse, mule or ass, found running at large upon public or private lands, either fenced or unfenced in the State of Wyoming whose owner is unknown in the territory where found, or the owner of which cannnot with reasonable diligence be found, or that is branded with two or more brands the ownership of which is disputed, neither party holding a bill of sale, shall be known as an estray, and it shall be unlawful for any person, persons, firm, company, association or corporation or their employees or agents to take up any such estray and retain possession of same, except as provided by law; provided further, that any such animal for which there is no sufficient proof of ownership found upon inspection, shall also be known as an estray.

11-500. Taking up estrays generally. No person shall take up an estray animal except in the county where he resides and is a freeholder, nor unless the same be found on lands owned, leased, or controlled by him or his duly authorized agents. When any such person takes up an estray animal he shall immediately notify an inspector who shall thereupon inspect, or cause to be inspected, the estray animal for brands and other evidence of ownership and who shall make a diligent effort to learn or determine ownership of the same. In his discretion, the inspector may cause any estray animal to be held for not more than ten days after such inspection, at a total expense of not more than fifty cents ($0.50) per day, to enable him to complete his investigation of ownership. If the estray animal is claimed by an owner, the bill for feed and care incurred by the inspector must be paid by the claimant. If the rightful owner cannot be found, or, when found, refuses or fails to pay the charges for feed and care of the estray animal, the inspector shall order

the estray animal sent to the most feasible convenient public market designated by the inspector, and there to be sold. Incurred charges for feed and care by the inspector and reasonable shipping and sales expense shall be paid from the proceeds of sale. The net proceeds, if any, received from the sale of the estray animal, after the deduction of authorized expenses, shall be forwarded to the estray fund of the agency. Said agency shall hold such proceeds in a special fund known as estray fund until the same are paid to the rightful owner of the estray animal or otherwise disposed of according to law.

Should the proceeds of sale of any estray animal or animals be insufficient to pay all legitimate expenses authorized by this act, the deficit shall be paid by the agency with the approval of the board.

11-503. Unclaimed horses—Permit for rounding up. Any person, persons, organization or corporation desiring to gather or round up unclaimed horses from the ranges within the State of Wyoming must, before commencing to engage in such activity, obtain written permission to do so. Such person may be entitled to a permit which must be obtained from the person, persons, organization or corporation who has ownership or control of the surface rights of the range whereon the unclaimed horses are to be gathered or rounded up. Said permit shall be presented to an inspector to be used for the basis for the issuance of any brand inspection permit for removal of such unclaimed horses from the county whereon such unclaimed horses are gathered or rounded up. The form of such permit shall be prescribed by the board.